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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 392

DIXON THEATRES, INC., *Petitioner*,

v.

BUFFALO THEATRES, INC., BIXON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and VINCENT B. MCFAUL, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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No.

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, The Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

JURISDICTION.

Dipson, Theatres, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on July 25, 1951. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.(1).

OPINIONS BELOW.

The opinion of the Second Circuit Court of Appeals (R. 2082) is reported at 190 F.(2d) 951. The opinion of the District Court (R. 9) is reported at 86 F. Supp. 716. The District Court dismissed an anti-trust suit brought by petitioner upon the ground that the respondents' conduct had not damaged the petitioner. The Circuit Court affirmed the dismissal on the ground that the respondents' conduct did not violate the anti-trust laws.

QUESTIONS PRESENTED.

The basic question is whether conduct which this Court has condemned as unlawful in a Government anti-trust suit may be found lawful in a private anti-trust suit. The specification of errors (p. 14) raises related questions which are important but subsidiary to this question.

THE STATUTES INVOLVED.

Petitioners' suit was brought under Section 4 of the Clayton Act, which reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731; 15 U.S.C. 15.

The anti-trust laws which forbid the conduct in issue here are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1 and 2. The Government suit in which this Court condemned that conduct was brought under Section 4 of the Sherman Act. 26 Stat. 209, 15 U.S.C. 4.

The provisions of the Clayton Act which define the benefits which private plaintiffs are to receive from Govern-

ment anti-trust litigation are found in Section 5 of that Act. 38 Stat. 73, 15 U.S.C. 16.

STATEMENT.

The opinion of the Circuit Court of Appeals holds that three of the major film distributors did not violate the anti-trust laws by agreeing to limit first and second-run exhibition of their films in Buffalo, New York, to theatres jointly owned and controlled by two of them. That holding is directly contrary to the decision of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131. In that case, the joint ownership in question here was dissolved and renewal of the Fox, Paramount and Loew[1] film franchises, which excluded other exhibitors from these runs, regardless of the merits of their theatres, was enjoined, pursuant to the mandate of this Court. 85 Fed. Supp. 881, 897.

Petitioner, Dipson Theatres, Inc., was organized in 1939 by Nikitas Dipson, an experienced motion picture exhibitor from Batavia, N. Y. (R. 93-96) to operate certain theatres in Buffalo, which were formerly operated by the respondent, Buffalo Theatres, Inc. That respondent had been organized in 1934 by respondents Loew, Paramount and McFaul to take over thirteen theatres previously operated by Michael Shea (R. 45, 490). Control of Buffalo Theatres, Inc., referred to in the opinion below and hereafter as Shea, was vested in Loew and Paramount, each of which had one-third of the stock and two of the six directors (R. 1192-93). McFaul served as President of Shea and "bought and booked" the films for the Shea theatres, in consultation with Loew and Paramount (R. 534) until October 1940, when Marcus Loew Booking Agency, a wholly-owned subsidiary of Loew, took over this function (R. 527-28).[2]

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[1] The same abbreviations for the names of the distributor respondents as appear in the opinion below are used herein. Loew is also known as Metro.

[2] McFaul testified that he didn't know whether Marcus Loew Booking Agency was a subsidiary of Loew (R. 528), but its subsidiary status was later conceded by his counsel (R. 580-81).

The principal theatres involved are the Century, a downtown first-run theatre which had been operated by Loew before Shea acquired it, (R. 1276) and the Bailey, operated by Shea as a second-run theatre in the northeast part of Buffalo. Both theatres were operated by Shea from the time it was organized until Dipson began operating them. Dipson acquired the Century by lease and the Bailey by purchase of the fee in April, 1939 (R. 112), but did not take over their operation until August of that year, when Shea's leases expired (R. 117). Shea also operated three other downtown first-run theatres and all of the remaining second-run theatres, the Kensington, Seneca, and Elmwood (R. 631-32, 1657-58). Petitioner's suit arose out of the fact that Dipson could not license for the Century and the Bailey the runs which they had when operated by Shea.

The claim as to the Century is relatively unimportant because it was operated by petitioner only from November 20, 1940 to June 29, 1941, when the lease was surrendered.[3] The claim as to the Bailey is for damages sustained from August 1, 1939 to September 26, 1946, the date the suit was filed. During this seven-year period it was compelled to play on third-run, following the second-run at Shea's Kensington, the films of respondents Fox, Loew, Paramount, RKO and United Artists, all of which had licensed the Bailey on second-run when it was operated by Shea. When the Bailey operated as a second-run theatre it earned about eighteen thousand dollars a year more than it did as a third-run theatre.[4]

Petitioner sought unsuccessfully to restore the Bailey's second run by an arbitration proceeding under the provisions of the consent decree entered in 1940 in the Paramount case (R. 414-15). The arbitrator found that the Bailey could earn more film rental than the Kensington and

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[3] Prior to that time it was operated by another corporation affiliated with Dipson called Century Theatrical Enterprises, Inc. (R. 153-54).

[4] Profits of about $16,000 a year were converted into losses of about $2,000 a year as appears from a comparison of the figures tabulated at pages 10 and 12, *infra*.

that the "clearance" established in 1939, which compelled the Bailey to play behind the Kensington was unreasonable (R. 1734-35). Petitioner appealed that decision pursuant to the consent decree provisions, on the ground that the arbitrator should have entirely eliminated the clearance instead of reducing it to three days. The Appeal Board held that the case afforded "a clear illustration of discrimination against a theatre solely because of a change of ownership" (R. 1739) and that this was "an obvious injustice" (R. 1740), but that it had no power to restore the Bailey's run (Ex. P-85 for ident, R. 1733).[5] It gave the maximum relief permitted by the consent decree by further reducing the Kensington's clearance to one day. The intimation by the Appeal Board that the distributor respondents should voluntarily restore the Bailey's run was ignored by them.

In 1945 the Government concluded that the 1940 consent decree was inadequate relief and brought the Paramount case to trial. That case gives prospective injunctive relief against the discriminations found in the arbitration proceeding but this suit is the sole remedy for the past injury they occasioned.

The Circuit Court's opinion refers to Shea's joint ownership and control by the respondents, Loew and Paramount, and notes that since the Paramount case condemned such joint ownership they have "consented to surrender their interest in Shea" (R. 2096). That consent judgment was entered as part of the final relief in the Paramount case, as noted by the District Court in its opinion giving effect to the mandate of this Court. 85 Fed. Supp. 881, 897. The opinion of this Court condemned such joint ownership in the following language:

> "To the extent that they have joint interests in the outlets for their films each in practical effect grants

[5] After permitting counsel for the respondents to examine Dipson about the proceeding and to describe what the Appeal Board held, the Trial Court refused to admit the decision itself in evidence (R. 483-85).

> the other a priority for the exhibition of its films. For in this situation as in the case where theatres are jointly managed, the natural gravitation of films is to the theatres in whose earnings the distributors have an interest. Joint ownership between exhibitor-defendants (Loew, Paramount, Fox, RKO and Warner) then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act." 334 U. S. 131, 151; names in parenthesis added.

The Circuit Court's opinion in this case states, on the other hand, that the admitted policy of Loew and Paramount to favor Shea's theatres because they had an interest in them "is no evidence that they conspired to do so jointly rather than doing so individually" (R. 2096) and that "Loew and Paramount could legally favor their own theatres" (2098). The basis for rejecting the contrary holding of this Court in the *Paramount* case is said to be a prior holding by the Circuit Court that the *Paramount* case is not "conclusive of the question of the conspiracy among the distributor defendants in a private treble damage action involving a single city" (R. 2092).[6]

For its finding of no conspiracy as to Fox, which gave Shea an exclusive first and second-run franchise in the city of Buffalo during the period 1937-42, regardless of the theatres it operated there (R. 1657-58), the Circuit Court re-

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[6] The petition for certiorari in that case, *Fifth and Walnut, Inc.* v. *Loew's Incorporated*, No. 400, Oct. Term, 1949, claimed that the Circuit Court's holding that theatre "pools" were not illegal per se was in conflict with the decision of this Court in the *Paramount* case. The distributor respondents conceded that this Court had condemned "pools" but opposed review on the ground that "There was no pool, as that term was used by the District Court and by the Court in the *Paramount* case" (Brief in Opp. pp. 21-22)

lies on the statement that Fox "gave Dipson all it could under its agreement with Shea" (R. 2095), to wit, third-run Buffalo, and first-run outside Buffalo. The fact that such agreements had been found unlawful in the *Paramount* case was apparently regarded as inconclusive here because that case did not hold all franchises to be illegal per se.

Loew's and Paramount's failure to cause Shea "to retain control of the Century and Bailey in 1939", when Dipson acquired them (R. 2097) is also cited as justification for finding no conspiracy to monopolize first or second-run exhibition in Buffalo. As the opinion states, "plaintiff only alleges a conspiracy with respect to runs" (R. 2098)[7] and concededly did not prove a conspiracy to hold all Buffalo theatres suitable for first and second-run exhibition. Petitioner's complaint was admittedly founded upon the fact that it had succeeded in acquiring the Century and Bailey theatres but could not then license the runs they had when operated by Shea.

A basic issue in this case and in the *Paramount* case was the legality of the power resulting from an exhibitor's operating agreements, franchises, or stock affiliation, with the major distributors, to pre-empt a prior-run playing position for its theatres, regardless of the suitability of competing theatres for operation on the run in question. This Court found in the *Paramount* case that one of the goals of these arrangements was "monopoly in exhibition" (334 U. S. 131, 170) and that such an exclusion of independent exhibitors was a violation of the Sherman Act, whether the goal of a theatre monopoly was in fact reached or not. 334 U. S. 131, 173.

There was no dispute that the exclusionary power flowing from the joint ownership and franchises here involved

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[7] The Court's table of varying clearances established in favor of the Kensington after the Bailey was reduced to a third-run theatre and Dipson began operating it (R. 2088), would disprove a conspiracy to establish a uniform clearance interval. It merely affirms the conspiracy charged here, which was one to prevent the Bailey from operating as a second-run theatre after Shea lost it.

had arbitrarily deprived petitioner of any opportunity to compete with Shea for a first or second run in Buffalo of the Fox, Loew or Paramount films. The Circuit Court, however, viewed these arrangements as permissible so long as they did not result in "a monopoly of first and second-run theatres" (R. 2096). In so holding the Circuit Court flatly contradicted the holding of this Court in the *Paramount* case.

The injury to petitioner resulting from the Circuit Court's refusal to be bound by the *Paramount* holding as to the illegality of these licensing discriminations is obscured in the opinion by other erroneous conclusions. Although the Loew-Paramount joint ownership of Shea, its franchises with the distributors and the Appeal Board decision which condemned the distributors' withdrawal of second-run from the Bailey when Shea lost it as "a clear illustration of discrimination against a theatre solely because of a change of ownership" (R. 1739), were all proven in the *Paramount* case,[8] the opinion erroneously suggests that evidence of the Buffalo situation was not introduced or relied upon by the Government in that case (R. 2093). Although the facts, noted by the Appeal Board, as to the ability of the Bailey to produce more revenue than the Kensington were again proven in this case by undisputed

[8] The Paramount-Loew joint ownership of the Shea theatres was proved in the *Paramount* case by Exs. 46 & 62. They are among the 14 theatres referred to in footnote 9 at page 151 of this Court's opinion as "Paramount-Loew's". The Appeal Board decision, marked for identification in this record as Ex. P-85, was admitted in evidence in the Paramount case as a part of Ex. 2. The franchises respectively appear on lists in evidence in that case, as Exs. 396, 376 and F-22. The Appeal Board decision is discussed at length at p. 109 of the Government's brief in the District Court in the *Paramount* case and is digested at pp. 406-07 of the appendix to the Government's briefs in this Court. There was no occasion to discuss the evidence as to the Fox, Loew or Paramount franchises as those defendants did not appeal from the District's Court's finding that they should be prohibited from making any franchise.

documentary evidence,[9] the opinion erroneously says that petitioner failed to show this (R. 2089).

While the merits of the theatres were disputed by counsel, there was no conflict in the evidence, which showed conclusively that the Kensington could not earn grosses or film rentals equal to those the Bailey could earn *on the same run.* Admittedly, the Bailey's earning power decreased after its demotion to an inferior run, but—and this is the crux of the case—admittedly it had outgrossed the Kensington when the two theatres had the same run.

The grosses of the Bailey and Kensington on every "A" film that played the Kensington from January 1, 1936 to August 1, 1942 are tabulated on Exhibit 136, (R. 1802) which shows the name and distributor of each film, the dates it played each theatre and the gross receipts of each during the engagement. The grosses of the Bailey on the films it played ahead of the Kensington greatly exceeded those of the Kensington on the films it played ahead of the Bailey (R. 1802; App. 1-23).[10]

The comparisons referred to by the Court *all relate to the period when the Bailey was compelled to play most of*

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[9] The grosses and film rentals produced by both theatres when operated by Shea on second-run, as they appear on Shea's profit and loss statements (Exs. P-95, P-98; R. 1747-48), are shown in the following table:

	Bailey		Kensington	
	Gross Adm.	Film Rental	Gross Adm.	Film Rental
1936	$121,426	$45,092	$ 93,494	$36,492
1937	139,511	50,530	100,671	37,084
1938	143,214	53,201	109,428	41,078

[10] Schedule XI a (R. 1802), which is a summary of Schedule XI, and the figures which appear on the first and last pages of Schedule XI itself (R. 1803) are the only parts of Exhibit 136 which appear in the printed record. The remaining pages of Schedule XI also show on their face the superior grossing capacity of the Bailey over the Kensington when these theatres alternated in playing the respondent's film first, and the much lower grosses made by the Bailey on third-run after May, 1939, when it was compelled to follow the Kensington on all of the respondent's films that the Kensington played on second-run. We have therefore printed Schedule XI in its entirety as an Appendix to this petition and the App. references are to the pages of that appendix.

its films after the Kensington and the Kensington played no films after the Bailey. They merely emphasize the basis for petitioner's damage claim, which is that the Bailey's earning power decreased when it became a third-run theatre. The 1940-42 figures on Ex. P-136 show also that the Kensington's grosses were correspondingly increased as its status as a theatre playing second-run exclusively became established. (R. 1802, App. 27-41).

The Bailey was bought by Dipson and Basil in April 1939 and was operated by petitioner upon the expiration of Shea's lease on July 31, 1939. Shea made it a third-run theatre in May 1939 (R. 1802, App. 23). For the last thirteen weeks of Shea's operation the Bailey played no films ahead of the Kensington, grossed only $25,008 and lost $1,018.87 (R. 1751-52). For the first thirteen weeks of 1939, it had grossed $37,067 and earned $5,077 (Ex. P-97, R. 1749). While both theatres were operated as second-run theatres by Shea, the operating profits of the Bailey, as well as its grosses, greatly exceeded those of the older and smaller Kensington, as shown in the following tabulation of Shea's profit and loss statements (Exs. P-95 through P-98; R. 1747-49):

	Bailey		Kensington	
	Gross Adm.	Net Profit	Gross Adm.	Net Profit or Loss
1936	$121,426	$12,408	$ 93,494	$2,199
1937	139,511	16,892	100,671	(1,395)
1938	143,214	16,139	109,429	1,014
1939 (1st Quart.)	37,067	5,077	24,911	806
Total	$441,218	$50,516	$328,505	$2,624

No distributors decided that they would gross more "by showing all their pictures at the Kensington first" (R. 2090) because there were no facts to support such a decision. The sales representatives of the distributors who testified at the trial did not claim that second-run was refused to Dipson at the Bailey for that or any of the "additional reasons" (R. 2090) which the Circuit Court recites. The District Court did not so find.

The defense witnesses all denied participation in any conspiracy to injure the Bailey, but the testimony of the respondent McFaul and his booker Murphy that the Bailey's run was switched to the Kensington by agreement with the distributors, Fox, Loew, Paramount, RKO and United Artists, in May, 1939, after McFaul learned that Dipson had bought the Bailey, was undisputed.[11] The decisions of Loew and Paramount to prefer the Kensington were admittedly controlled by their desire to favor their own theatres. The decision of Fox was admittedly controlled by the first three-year franchise made in 1937, which extended through the 1939-40 season.

While finding it "unnecessary to discuss" the challenged District Court findings of no damage, the Circuit Court suggests in concluding its opinion that there was no adequate proof of damage in any event (R. 2098). A glance at the profit and loss figures for the two theatres during 1940-45 shows that the effect of Shea's 1939 switch of the Bailey's second-run to the Kensington was to switch to the Kensington the Bailey's second-run profits, tabulated at p. 10, *supra*.

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[11] Murphy, who had left Shea prior to the trial, testified that in 1937, 1938 and in 1939 until a little more than two months before the expiration of Shea's lease, the Bailey and Shea's other second-run theatres, the Elmwood and Seneca, all played the majority of their films at the same time and ahead of the Kensington (R. 752-53). When asked to describe the change made in May, 1939, he said:

"A. We switched the so-called day and date run of the Bailey with the Elmwood and Seneca to the Kensington" (R. 753). Respondent McFaul reluctantly admitted that he had learned of Dipson's purchase of the Bailey in April, 1939 (R. 609), that the prospect of moving out of the theatre was the reason for making the change (R. 610-611) and that all of the distributors whose films were involved in the change agreed to it (R. 605). As the table in the opinion below shows, the only distributors not parties to the agreement were Columbia, Universal and Warner (R. 2088).

	Bailey		Kensington	
	Admns.	Net Profit or Loss	Admns.	Net Profit
1940	$110,098	$2,057	$130,963	$13,864
1941	106,134	(3,045)	123,017	8,202
1942	115,542	4,304	142,477	13,505
1943	107,679	(2,376)	135,712	10,541
1944	120,238	(2,916)	143,529	10,122
1945	133,371	(4,924)	147,091	13,578
Total Period	$693,062	(6,900)[12]	$822,789	$69,812

[12] Figures in parenthesis indicate a loss. The Bailey figures are from petitioner's profit and loss statements. Exs. P-190 through P-195; (R. 1940-92). The Kensington figures are from Shea's profit and loss statements (Exs. P-95 and P-96; R. 1747-48)). The profit and loss figures tabulated above have not been adjusted to exclude the miscellaneous income received in addition to the admissions. So adjusted, the Bailey's loss for the period 9/1/39 to 9/17/46 was $19,115 or an average of about $2,700 per year (Ex. P-182, R. 1905, Note to Col. 6).

The undisputed operating figures also showed extensive damage to the Bailey under the precise formula approved by this Court in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, where an independent Chicago neighborhood theatre was also excluded from a prior-run enjoyed by a theatre affiliated with Paramount. The independent Jackson Park earned substantial net profits during the five years it was excluded from the run of the affiliated Maryland, but was awarded as damages the additional profits it might have made, if allowed to compete for the Maryland's run. Two formulae for computing such damages were approved by this Court. The lower figure of $115,982, was determined by subtracting the Jackson Park's net receipts (admissions less film rental) for the five-year period from the like net receipts of the slightly larger Maryland. 327 U. S. 251, 257-58. If the Bailey's net receipts for the six calendar years 1940-45, are subtracted from the like net receipts for

that period of the Kensington, a smaller theatre, the difference is $109,496.[13]

It is sufficient to say with respect to the Century that Shea made substantial profits from the exhibition of Fox, Loew and Paramount first-run films at that theatre under the franchises which excluded petitioner from access to them when it operated the same theatre.[14] There was no proof or finding below that petitioner was not hurt by lack of competitive access *to those films.* The defense sought only to show that petitioner was additionally handicapped by poor management and adverse general business conditions.

The respondents persuaded the District Court to ignore the undisputed proof of injury by emphasizing the difficulties involved in determining *the amount* of petitioner's damage. None of this evidence rebutted *the fact of injury* and tended at most to make ascertainment of the *extent of the injury* uncertain. The Bigelow case held that uncertainty as to the extent of the injury cannot relieve an anti-

[13]

	Bailey			Kensington		
	Admissions	Film Rental	Net Receipts	Admissions	Film Rental	Net Receipts
1940	$110,098	$ 40,673	$ 69,425	$130,963	$ 45,918	$85,045
1941	106,134	43,799	62,335	123,017	42,752	80,265
1942	115,532	44,999	70,543	142,477	49,949	92,528
1943	107,679	41,404	66,275	135,712	45,768	89,944
1944	120,238	44,298	75,940	143,529	49,296	94,233
1945	133,371	44,734	88,637	147,091	46,455	100,636
Total	$693,062	$259,907	$433,155	$822,789	$280,138	$542,651
Average per yr.	$115,510	$ 43,318	$ 72,192	$137,131	$ 46,690	$ 90,441

Admissions and film rentals are from the profit and loss statements. Bailey (Exs. P-189 through P-195, R. 1932-92); Kensington (Ex. P-95, R. 1747).

[14] The reference in the opinion to losses at the Century under Shea's management (R. 2091) is to losses which were incurred in 1939, after Shea had decided not to renew its lease. During 1936-38 it earned a total net profit of $42,086 before deducting the Loew share called "additional film rental" (Ex. P-125, R. 1780). The so-called additional film rental was in fact a percentage of Shea's net profits granted to Loew as part of the consideration for its franchise (Ex. P-133, R. 1794-95).

trust defendant from liability where the fact that illegal conduct has injured the plaintiff's business has been shown. 327 U. S. 251, 265.

The evidence of bad management and unfair competition at the Bailey, referred to in the Circuit Court's opinion (R. 2090) relates to only one of the seven years during which damages were sustained. The reference to alleged bad management at the Century is to self-serving opinions offered at the trial by employees of the defendants. If the District Court's judgment could have been sustained by affirming its findings as to lack of damage, there would have been no occasion for the Circuit Court's discussion of the law violation issue.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in refusing to apply the principles of law established in *United States* v. *Paramount*, 334 U. S. 131, in determining whether or not an anti-trust law violation had occurred.

2. The Circuit Court erred in failing to consider and reverse the erroneous findings as to damages which resulted from the District Court's refusal to apply the principles of law established in *Bigelow* v. *RKO Pictures, Inc.*, 327 U. S. 251.

3. The Circuit Court erred in inferring non-existent reasons for the distributors' refusal to deal with petitioner for the runs licensed to Shea.

4. The Circuit Court erred in suggesting that additional injury from bad management and unfair competition by others could excuse an injury resulting from anti-trust law violations.

5. The Circuit Court erred in failing to reverse the District Court and direct the entry of a judgment in favor of petitioner.

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court's holding requires review here because its effect is to nullify the principles of law established by this Court in *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131. Since the final decision in the *Paramount* case was not rendered until after petitioner's case was tried[16] and its case was heard by the District Court without a jury, the questions as to admissability of government anti-trust pleadings in private suits and proper jury instructions, involved in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, are not here. The decision below is, however, also in conflict with the basic assumption of the *Emich* decision, i.e., that treble damage plaintiffs should have the benefit of whatever propositions of law are established in Government anti-trust litigation. The Circuit Court's opinion holds that no principles of law were established in the *Paramount* case which can control the decision of an issue of law violation which arises in a private anti-trust suit.

The Circuit Court's holding that absence of a complete monopoly may excuse a licensing discrimination which has a monopolistic purpose repeats one of the errors which occasioned this Court's reversal of the original *Paramount* decision by the three-judge District Court. 66 Fed. Supp. 323. The Circuit Court evidently thought that the fact that Shea had not achieved a theatre operating monopoly was significant when it said, "Had a monopoly been obtained by Shea we might have viewed the question differently" (R. 2096). In the *Paramount* case this Court noted the failure of the District Court to find any monopoly or attempt to monopolize "even with respect to the theatres jointly owned by distributors" (334 U. S. 131, 169) and pointed out that "the power to exclude competition when it is desired to do so" (334 U. S. 131, 173) when couped with the exclusionary purpose found in that case, violates Section 2 of the Sherman Act, whether a theatre monopoly is achieved or not; citing *American Tobacco Co.* v. *United*

[16] See Chronology of Reported Decisions under TABLE OF AUTHORITIES, *supra*, and District Court docket entries (R. 6-7).

States, 328 U. S. 781, and *United States* v. *Griffith,* 334 U. S. 100.

In the *Griffith* case, as in the similar *Crescent*[17] and *Schine*[18] cases, the violations found included a series of conspiracies between *some of the distributors* and an independent theatre circuit, i.e., one not affiliated with a distributor, to give prior runs to the circuit's theatres, regardless of the suitability for such runs of the theatres competing with the circuit. Griffith had not obtained a monopoly of the first-run product or all of the distributors in any town where there was a competing theatre but their monopolistic purpose made its several agreements with the distributors unlawful. 334 U. S. 100, 109.

One form of agreement by which such discrimination was assured was the film franchise, which assured the circuit theatres of first-run privileges for long periods of time, generally from two to five years, regardless of any competitive changes which might occur while the franchise was in force. Generally the theatres enjoying the privilege were named in the franchise but sometimes, as here, the franchise ran to the exhibitor, regardless of what theatres he might lose or acquire (R. 1657-58). These franchises were an explicit avowal of a monopolistic purpose which would otherwise only be inferred from a repeated discriminatory course of conduct, to prefer the favored exhibitor regardless of the suitability of his theatres and those of his competitors for the run sought. The franchises in the *Crescent, Schine* and *Griffith* cases were accordingly all found illegal and enjoined. The Circuit Court's suggestion that franchises merely assured the distributors that their product would be exhibited by the best exhibitor (R. 2095) was explicitly rejected by this Court as a legal justification for them in the *Crescent* case. 323 U. S. 173, 182-183, 187.

The refusal of the Circuit Court to be bound by this Court's decision is highlighted by the description of a con-

[17] *United States* v. *Crescent Amusement Co.,* 323 U. S. 173.

[18] *Schine Theatres* v. *United States,* 334 U. S. 110.

spiracy among some of the distributor respondents[19] to favor first-run theatres affiliated with them as "entirely different from that shown in the *Paramount* case which apparently favored large combines such as Dipson" (R. 2097). That is the very interpretation of this Court's decision which the three-judge Court rejected in divorcing the major distributors from their affiliated theatres. 85 Fed. Supp. 881, 895. If the *Paramount* conspiracy had not protected affiliated combines, such as Shea, against competition from independent circuits, such as Dipson, there would have been no basis for such disaffiliation.[20] This Court had rejected the respondent's claim that the basic evil in the *Paramount* case was discrimination in favor of large circuits, regardless of affiliation, when it rejected competitive bidding as a remedy. 334 U. S. 131, 164-65. It again rejected the same claim when it affirmed the divorcement judgment, per curiam, in a memorandum opinion. 339 U. S. 974.

In the *Paramount* case, where Fox, Loew, Paramount, RKO and Warner were the principal defendants, it appeared that precisely the same type of discrimination as that embodied in franchises had been produced by affiliation of these distributors with theatre circuits, through stock ownership and operating agreements. It also appeared that *two or more of these distributors* would sometimes, as

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[19] The fact that some of the distributors licensed Dipson on first-run at the Century and on second-run at the Bailey does not distinguish this conspiracy from that found in the Paramount case. As the District Court's findings and this Court's opinion show, one or more of the distributor respondents licensed their films on first-run to independent theatres in fifty of the largest cities (70 F. Supp. 53, 70, Fndg. 148; 334 U. S. 131, 167).

[20] The inability of even the largest independent theatre circuits to compete with affiliated theatres was expressly recognized in the Crescent and Schine decrees, which exempted those defendants from competitive licensing provisions in situations where their theatres were in direct competition with affiliated theatres. Thus, paragraph three of the Schine decree excluded Buffalo, where Schine was in competition with Shea (334 U. S. 111, 124, footnote 12) and the Crescent decree excluded Nashville, where Crescent was in competition with Loew (323 U. S. 173, 187).

in Buffalo, pool their theatre holdings by joint ownership of stock in a single operating corporation, and then exclude competing unaffiliated theatres from the prior-run playing position enjoyed by the affiliated theatres. This was done by committing their own films for such runs exclusively to the jointly-owned theatres and by inducing enough of the other principal distributors to commit their films in similar fashion, so that the independents could not operate successfully on those runs.

The result was that most of the first-run theatres in cities of more than 100,000 were affiliated with one or more of these five major film distributors. 334 U. S. 131, 167. This Court found a series of local vertical conspiracies between each of these distributors and its first-run accounts to give these theatres a monopoly of the available patronage and a nation-wide horizontal conspiracy among the distributors themselves to establish a uniform system of runs in all communities. 334 U. S. 131, 170-171.

This Court held all joint ownerships of theatres by the distributor respondents to be invalid restraints on competition and ordered each of them dissolved. 334 U. S. 131, 151. This Court also invalidated all franchises except those made with independent exhibitors to enable them to compete with affiliated theatres.[21] The Circuit Court's statement that neither franchises nor joint ownerships of theatres was held by this Court to be illegal "per se" does not explain its refusal to accept this Court's holding that all franchises *made with theatres affiliated with the major distributors* and all joint ownership of theatres by *two or more of those distributors* are illegal. The franchises and joint ownership before the Circuit Court not only fell clearly within the classes invalidated by this Court's decision but

[21] This court said that franchises are not "illegal per se when extended to any theatre or circuit no matter how small". 334 U. S. 131, 156. The District Court on the remand construed this language as saving only franchises made with independent theatres. 85 Fed. Supp. 881, 897.

were, themselves, actually enjoined by the final judgment. 85 Fed. Supp. 881, 897.

Even if the Circuit Court's suggestion that these franchises and this joint ownership were invalidated in the *Paramount* case only because they were "found to facilitate" (R. 2092) a larger conspiracy is accepted they may not be isolated from that conspiracy in this suit. A single agreement which is illegal only because it is one of a number of similar agreements made by an anti-trust law violator for a trade restraining purpose may be just as injurious as any other form of illegal agreement. *United Shoe Machinery Company* v. *LaChapelle*, 212 Mass 467, 99 N. E. 289, 293; cited with approval in *Transparent-Wrap Corp* v. *Stokes & Smith Co.*, 329 U. S. 637, 647.

In these circumstances, the Circuit Court's refusal to be bound by the *Paramount* decision in resolving the law violation issue presented in this suit, in effect, construed Section 4 of the Clayton Act to require proof of a different anti-trust law violation than any proven by the Government. There is no warrant in any decision of this Court for such a construction and its effect is to nullify the private remedies for anti-trust law violations granted by the Clayton Act.

The private plaintiff cannot derive from a decision in a Government anti-trust suit the benefits that Section 5 of the Clayton Act contemplates, unless he may rely on such a decision to show the illegal nature of the conduct he complains about.[22] This is especially true where the conduct

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[22] While the Government judgment is only a *prima facie* estoppel as to matters of law as well as fact, where a proposition of law has been settled by a decision of this Court the decision must conclude the lower Courts until such time as this Court chooses to overrule it. As Senator Reed pointed out in debate on Section 5, the reason for changing the conclusive estoppel, provided in the original bill to a prima facie estoppel was, where matters of law are concerned, to permit defendants to show that this Court had subsequently overruled or otherwise weakened the authority of the original decision. 51 Cong. Rec., 13899.

that injures him is illegal only because of its connection with a nation-wide conspiracy. Many of the parties to such a conspiracy are, by its nature, outside the reach of the private plaintiff's process and he does not have the resources to prove such a conspiracy, in any event. The Government is also never bound to show injury to any specific competitor as an element of its case and for that reason the impact on the plaintiff's business of the defendant's illegal conduct must generally be proven without the benefit of any estoppel created by a Government judgment.

If the Government litigation does not even establish in the private suit that conduct condemned by a decision of this Court is illegal, then the private plaintiff takes nothing of value from the Government litigation. The decision below, thus, reflects a profound hostility to the purposes of the Clayton Act, as found by this Court in the *Emich* case.[23] Since the Bailey-Kensington discrimination, sanctioned by this decision, was widely publicized through the prior arbitration decision as "an obvious injustice" (R. 1740) the Circuit Court's opinion has been heralded in the trade as a warning to injured exhibitors that no matter how obvious the injustice there may be no recovery under the Clayton Act.

2. The Circuit Court's opinion has also introduced a novel technique for excusing private injury resulting from anti-trust law violations which, if widely employed, would nullify Section 4 of the Clayton Act. The Courts have sometimes ignored the reasons assigned by anti-trust defendants for their conduct in favor of inferences compelled by results which were necessarily contemplated when the conduct was undertaken, but this appears to be the first time that trade restraining conduct has been justified by reasons

[23] "Congressional reports and debates on the proposal which ultimately became Section 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in anti-trust actions". 340 U. S. 558, 568.

which the witnesses engaging in the conduct were unable or unwilling to articulate at the trial.

The tactic with which the defendants succeeded here was merely to place facts in the record which might conceivably have influenced the distributors' refusal to deal with petitioner for the runs in question instead of offering the testimony of the persons who participated in or authorized the refusal, as to why the refusal occurred. In this way the reasons argued in counsel's briefs and accepted by the Circuit Court were not subjected to the tests of credibility normally used at a trial, such as cross-examination under oath. Since refusals to deal are perhaps the most common means of effectuating trade restraining conspiracies, their judicial justification is a matter of vital concern to this Court. Cf. *Kiefer-Stewart* v. *Seagram*, 340 U. S. 211, 213.

The Courts have generally prevented a successful use of the tactics employed here by inferring from the failure of the defendants to supply testimony as to the reasons in question at the trial, that their testimony, if produced, would have been unfavorable to their contentions. Cf. *Interstate Circuit* v. *United States*, 306 U. S. 208, 225, 226.[24] The failure of the Circuit Court to draw that inference here is emphasized by its seizing upon contradictory reasons, not even logically relevant, to sustain the distributors' conduct.

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[24] The Supreme Court commented upon the defendant's failure to produce the testimony of their principal sales executive as to why the restrictions in question were imposed, as follows: (p.226) "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton* v. *United States*, 4 How. 242, 247, 11 L. ed. 957, 959. Silence then becomes evidence of the most convincing character. *Runkle* v. *Burnham*, 153 U. S. 216, 225, 38 L. ed. 694, 697, 14 S. Ct. 837; *Kirby* v. *Tallmadge*, 160 U. S. 379, 383, 40 L. ed. 463, 465, 16 S. Ct. 349; *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 153, 154, 68 L. ed. 221, 223, 224, 44 S. Ct. 54; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 111, 112, 71 L. ed. 560, 565, 566, 47 S. Ct. 302; *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52, 72 L. ed. 137, 151, 48 S. Ct. 1; *Local 167, IBT* v. *United States*, 291 U. S. 293, 78 L. ed. 804, 809, 54 S. Ct. 396."

The Circuit Court's assertion that "it was uncontroverted that the Kensington was in a growing and the Bailey in a declining neighborhood" (R. 2089) is apparently thought to justify the distributors' decision to prefer the Kensington although, as noted above, no witness said that any distributors' decision was influenced in any degree by this or the other "additional reasons" suggested in the opinion for such a preference. The opinion itself contradicts this "reason" in saying it was "not disputed that the Kensington and the Bailey were so similar in quality and location" that "one had to be preferred over the other", (R. 2086) i.e. selected as the appropriate first-run outlet for the common area from which both drew their patronage.

Similarly, the fact that Dipson was "more of a dealer in theatres than Shea" (R. 2090) was plainly not relevant to a choice of the Kensington over the Bailey as the prior-run outlet. No witness could have honestly testified that this "was a further factor in the decisions of some distributors to prefer the Kensington" (R. 2090) in view of the fact that the preference was not a selection of one customer as against another. According to other parts of the opinion Dipson was a large operator (R. 2084), whom the distributors desired to favor because he was "a far larger exhibitor than Shea in the country as a whole" (R. 2089). The fact that all distributors continued to license Dipson at the Bailey and elsewhere should have prevented, in any event, the Circuit Court's inference that Dipson's alleged reputation as a "dealer in theatres" caused the distributor respondents to prefer the Kensington when Shea lost the Bailey.

If such inferences are legally permissible, a Court may excuse any injury resulting from a refusal to deal, regardless of its actual purpose. The decision below contrasts sharply with that of the Third Circuit Court of Appeals in *Ball et al.* v. *Paramount Pictures, Inc.*, 169 Fed. (2) 317, where findings of no conspiracy among these distributors, based only upon their testimony that they did not conspire, were reversed.

3. The Circuit Court's opinion, in its concluding remarks about damages (R. 2098), challenges the correctness of this Court's decision in *Bigelow* v. *RKO Pictures, Inc.*, 327 U. S. 251. Whether an operating loss sustained at the Bailey or Century in any particular year seemed to the Circuit Court to result from bad management, unfair competition by the Genesee or other similar factors is not material to the issue of whether or not these theatres were injured by their exclusion from the runs in question. Since the exclusion adversely affected their earning power, it was immaterial whether the adverse effect was a reduction of profits or an increase in losses. In either event, the petitioner's damage was the differences between its actual profit or loss and an estimated profit or loss figure, based upon an assumed access to the runs in question.

The effect of other factors than the law violations upon either actual or assumed profit and loss figures cannot be accurately measured. Presumably, it remains constant for any given period as to both the actual and estimated figures, but in no event can the presence of such factors affect anything but a calculation of the amount of the damage. This Court held in the *Bigelow* case that consideration of all factors extraneous to the illegal exclusion of a neighborhood theatre from a prior run could properly be eliminated by comparing the net receipts (admissions less film rental) of the excluded theatre with those of a defendant's comparable theatre in the same neighborhood, which enjoyed the run in question during the period of the plaintiff's exclusion. Such a comparison here shows damages to the Bailey in excess of $100,000.[25] Petitioner also showed that the change in the Bailey's run converted profits into losses while it was managed by Shea (R. 1751-52). If such

[25] See the computation at page 13, *supra*. This method of computation is more favorable to the defendants in this case than in the *Bigelow* case because the Bailey had a proven capacity to earn more than the Kensington on the same run. In the *Bigelow* case the injured Jackson Park had never played on the run enjoyed by the affiliated Maryland.

proof does not show injury then no motion picture exhibitor may recover damages for a lost run.

The District Court ignored the undisputed profit and loss figures of the Bailey and Kensington before and during the illegal conduct, which established the Bailey's injury. Its conclusion that the Bailey sustained no injury is supported only by findings which show at most that the amount of the damage was uncertain. The amount of the damage sustained from anti-trust law violations is always uncertain, as speculative assumptions are involved in any estimate of the amount, but the wrong-doers must bear the risks which such uncertainty creates. *Story Parchment Paper Company* v. *Patterson Parchment Paper Company,* 282 U. S. 555, 563. The District Court's conclusion that the Bailey was not damaged by the respondent's conduct was a plain error of law which the Circuit Court should have noted and corrected. By not discussing the damage findings, the Circuit Court's opinion conceals the nature of this error and repeats it by suggesting that additional injury from other adverse factors could excuse the injury resulting from respondent's illegal conduct.

Both opinions below ignore the purpose of Section 4 of the Clayton Act in requiring the entry of a judgment for treble the amount of the damage sustained. That requirement is plainly intended to punish unlawful conduct, in addition to restoring business losses. The interest of society in punishing conduct prohibited by the anti-trust laws is not served by resting liability upon a comparative evaluation of plaintiffs and defendants; or an appraisal of the impact on the plaintiff's business of factors other than the defendant's conduct; yet the opinions below are mainly concerned with a subjective appraisal of the general character of Dipson and Shea as theatre operators and the impact upon petitioner of factors extraneous to the illegal conduct. If the respondents' offense may be excused in this fashion a theft of $100,000 from petitioner's safe could also be excused on the ground that Dipson would have lost the

money anyway from other causes or that Dipson was not the kind of person who ought to have $100,000.

The end result of the Circuit Court's opinion is to deny recovery to persons injured by anti-trust law violations, no matter how explicitly the accused conduct may have been condemned as illegal by this Court and no matter how closely the plaintiff's damage proof parallels proof approved by this Court as adequate to show injury. Unless the decision below is reviewed and reversed, this Court's decisions in the *Paramount*, *Emich* and *Bigelow* cases will have no binding effect in the Second Circuit.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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OCT 22 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 392

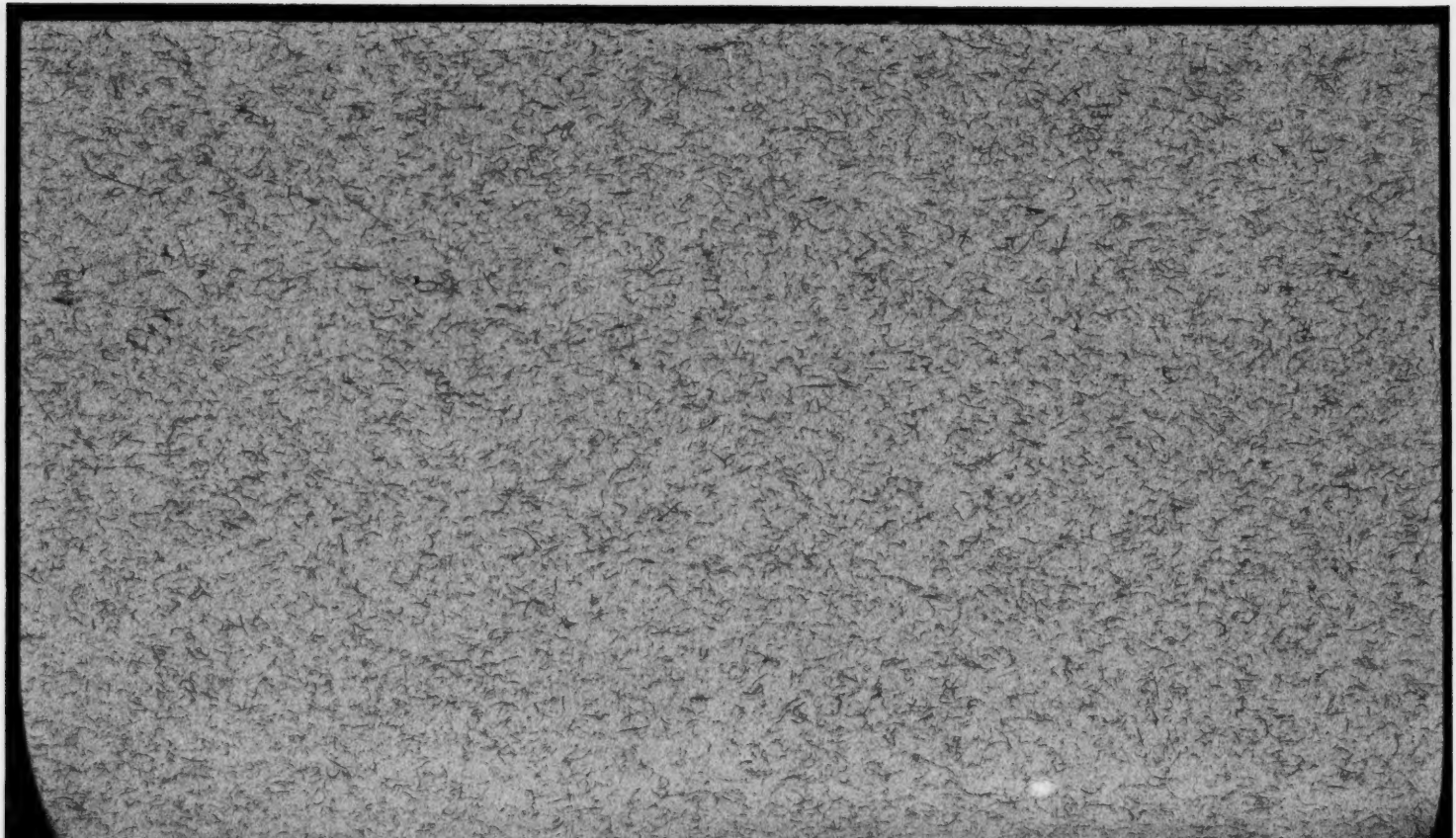
DIPSON THEATRES, INC., *Petitioner*,

v.

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION, AND VINCENT R. MCFAUL, *Respondents*.

APPENDIX
to
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C.



SCHEDULE XI (1)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Big Broadcast 1936	*1936*	1/1,2		Par.		922.35
C. Chan in Shanghai		1/3,4		Fox		424.25
Mutiny on the Bounty	1/1–4	1/5–7	B	Metro	1,673	1,036.80
Red Salute	1/15–16	1/8,9	K	U. A.	1,416	332.05
It's in the Air	1/11	1/10–11	K	Metro		656.50
Hands Across the Table	1/17–18	1/12–14	K	Par.	467	986.95
Case of Lucky Legs	1/8–9	1/15,16	B	W. B.	386	277.45
Dr. Socrates		1/17,18		W. B.		449.40
Night at the Opera	1/12/4	1/19–21	B	Metro	765	714.90
Peter Ebbetson	1/29,30	1/22,23	K	Par.	361	224.45
Three Musketeers	1/10,11	1/24,25	B	R. K. O.	557	383.80
Thanks a Million	1/18–22	1/26–28	B	Fox	1,343	897.70
Metropolitan	1/23	1/29–30	B	Fox	78	169.90
Last Days of Pompeii	1/24,25	1/31–2/1	B	R. K. O.	539	388.00
In Old Kentucky	1/26–28	2/2–4	B	Fox	1,162	991.05
Melody Lingers On	2/2,3	2/5,6	B	U. A.	332	206.40
So the Red Rose	1/31–2/1	2/7–8	B	Par.	402	400.30

Source: Photostats of Defendant-Exhibitors' operating records, furnished by Messrs. Raichle, Tucker and Moore.

Operating records of Dipson Theatres, Inc. and its predecessor, in possession of Plaintiff.

Distributors' names obtained from annuals compiled by the Motion Picture Daily and from Defendant-Exhibitors' records, as above.

Note: Only the "Top" or "First Feature" or "A" pictures from the double bills were used in making this schedule.

Columbia Pictures do not appear, because they were not used at the Kensington.

Approximately half of Warners Pictures, after August 1, 1939, do not appear, because they were not used at the Kensington.

* Schedule XIa of this exhibit appears at R. 1802. This is printed from certified copy of Schedule XI used on argument

SCHEDULE XI (1) (*Continued*)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Frisco Kid		2/2–4	2/9–11	B	W. B.	1,162	747.75
Man Who Broke Bank at Monte Carlo		2/5,6	2/12–13	B	Fox	429	366.50
Mary Burns Fugitive		2/7,8	2/14–15	B	Par.	531	391.45
Littlest Rebel		2/9–11	2/16–18	B	Fox	1,417	982.35
Sylvia Scarlet		2/26	2/19,20	K	R. K. O.	100	266.30
Wipsaw		2/14–15	2/21,22	B	Metro	642	584.50
Annie Oakley		2/27–29	2/23–24	K	R. K. O.	611	666.85
The Payoff		2/19,20	2/25,26	B	W. B.	215	207.50
Ah Wilderness		3/6,7	2/27–29	K	Metro	518	795.70
Riff Raff		3/20,21	3/1,2	K	Metro	428	819.80
I Dream Too Much		3/11,12	3/3–4	K	R. K. O.	172	340.30
Bride Comes Home		2/16–18	3/5–7	B	Par.	1,254	936.80
Show Them No Mercy		3/13,14	3/8–10	K	Fox	403	782.55
I Found Stella Parish		3/4–5	3/11,12	B	W. B.	391	408.25
SCHEDULE XI (2)							
King of Burlesque	*1936*	2/23–25	3/13,14	B	Fox	1,258	473.45
Tale of Two Cities		3/8–10	3/15–17	B	Metro	1,027	670.85
Unknown Woman			3/18–19		Col.		105.10
Collegiate		3/1–3	3/21	B	Par.	1,403	676.95
Magnificent Obsession		3/15–17	3/22–24	B	Univ.	1,048	995.40
Splendor		3/18–19	3/25–26	B	U. A.	275	365.85
Miss Pacific Fleet		3/25–26	3/27,28	B	W. B.	352	482.65
Captain Blood		3/22–24	3/29–31	B	W. B.	1,141	719.50

SCHEDULE XI (2) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Feather in Her Hat	4/8–9	4/1–2	K	Col.	172	225.25
C. Chan's Secret		4/3–4		Fox		370.90
Ceiling Zero	3/29–31	4/5–7	B	W. B.	1,264	743.30
Dangerous	4/1–2	4/8–9	B	W. B.	557	359.65
Professional Soldier	4/3–4	4/10–11	B	Fox	598	343.35
Milky Way	4/17–18	4/12–14	K	Par.	589	908.05
Petrified Forest	4/22–23	4/15–16	K	W. B.	371	469.30
Anything Goes	4/5–7	4/17–18	B	Par.	1,400	535.00
Strike Me Pink	4/12–14	4/19–21	B	U. A.	1,410	828.00
Lady Consents	4/15–16	4/22–23	B	R. K. O.	401	423.05
Fang and Claw	4/10–11	4/24–25	B	R. K. O.	260	399.25
Rose Marie	4/19–21	4/26–28	B	Metro	1,058	742.50
Ghost Goes West	5/6–7	4/29–30	K	U. A.	316	438.95
Tough Guy	4/24–25	5/1–2	B	Metro	498	355.65
Klondike Annie	4/26–28	5/3–5	B	Par.	1,180	769.45
Rose of the Ranch	4/29–30	5/6–7	B	Par.	323	316.10
Paddy O'Day	5/1–2	5/8–9	B	Fox	431	314.60
Wife vs. Secretary	5/3–5	5/10–12	B	Metro	1,576	588.95
Broadway Hostess	5/27–28	5/13–14	K	W. B.	349	347.00
The Big House (reissue)	5/8–9	5/15/16	B	Metro	427	436.20
Country Doctor	5/10–12	5/17–19	B	Fox	801	712.55
It Had to Happen	5/13–14	5/20–21	B	Fox	602	268.05
Voice Bugle Ann	5/15–16	5/22–23	B	Metro	423	335.45

SCHEDULE XI (3)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Modern Times	*1936*	5/17–19	5/24–26	B	U. A.	927	727.00
Desire		8/20–21	5/27–28	B	Par.	511	372.05
Prisoner Shark Island		5/22–23	5/29–30	B	Fox	470	687.25
Trail of the Lonesome Pine		5/24–26	5/31–6/3	B	Par.	1,328	856.90
Story Louis Pasteur		6/16–17	6/4–5	K	W. B.	366	345.80
Garden Murder Case		5/29–30	6/5–6	B	Metro	740	360.00
Follow the Fleet		5/31–6/2	6/7–9	B	R. K. O.	1,176	612.35
Moonlight Murder		6/3–4	6/10–11	B	Metro	540	73.40
Petticoat Fever		6/5–6	6/12–13	B	Metro	429	729.45
Captain January		6/7–9	6/14–16	B	Fox	1,092	850.00
Singing Kid		6/10/11	6/17–18	B	W. B.	423	288.80
Robin Hood Eldorado		6/12–13	6/19–20	B	Metro	361	292.00
Colleen		6/14–15	6/21–23	B	W. B.	920	859.20
Unguarded Hour		7/1–2	6/24–25	K	Metro	462	225.90
Little Lord Fauntleroy		6/18–20	6/25–27	B	U. A.	442	542.10
Small Town Girl		6/21–23	6/28–30	B	Metro	1,254	991.95
Moon's Our Home		6/24–25	7/1–2	B	Par.	437	277.40
Sutter's Gold		6/26–27	7/3–4	B	Univ.	428	232.45
Mr. Deeds Goes to Town		6/28–30	7/5–7	B	Col.	1,072	696.35
Witness Chair		7/15–16	7/8–9	K	R. K. O.	310	218.90
Message to Garcia		7/3–4	7/10–11	B	Fox	507	282.15
These Three		7/5–7	7/10–14	B	U. A.	823	535.45
I Married a Doctor		7/8–9	7/15–16	B	W. B.	314	295.00
C. Chan in the Circus		7/10–11	7/17–18	B	Fox	429	294.60
Under Two Flags		7/12–14	7/19–21	B	Fox	673	814.25

SCHEDULE XI (3) *(Continued)*

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Golden Arrow		7/29–30	7/22–23	K	W. B.	500	458.35
13 Hours by Air		7/17–18	7/24–25	B	Par.	669	470.30
Showboat		7/19–21	7/26–28	B	Univ.	695	640.50
Road Gang		7/22–23	7/29–30	B	W. B.	541	387.25
Ex Mrs. Bradford		7/24–25	7/31–8/1	B	R. K. O.	611	438.90
Princess Comes Across		7/26–28	8/2–4	B	Par.	1,053	686.85

SCHEDULE XI (4)

Dancing Pirate	*1936*	8/12–13	8/5–6	K	R. K. O.	362	340.50
Things to Come		7/31–8/1	8/7–8	B	U. A.	583	346.30
Bullets or Ballots		8/2–4	8/9–11	B	W. B.	753	633.20
Big Brown Eyes		8/5–6	8/12–13	B	Par.	628	544.70
Boulder Dam		8/7–8	8/14–15	B	W. B.	497	301.45
Private Number		8/9–11	8/16–18	B	Fox	1,405	998.30
Case Against Mrs. Ames		8/26–27	8/19–20	K	Par.	601	594.45
Son's O' Guns		8/14–15	8/21–22	B	W. B.	935	633.95
San Francisco		8/16–19	8/23–26	B	Metro	1,684	1,604.25
Three Wise Guys		8/20	8/27	B	Metro	248	399.65
Snowed Under		8/21–22	8/28–29	B	W. B.	765	505.90
Poppy		8/23–25	8/30–9/1	B	Par.	1,138	1,123.45
Return of Sophie Lang		9/11–12	9/2–3	K	Par.	828	442.60
Fury		8/28–29	9/4–5	B	Metro	966	418.75
White Angel		9/10–11	9/6–7	K	W. B.	457	899.85

SCHEDULE XI (4) (*Continued*)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Public Enemy's Wife		8/30–9/1	9/8–10	B	W. B.	1,588	588.95
Dancing Lady		9/2–3	9/11–12	B	Metro	542	504.90
Special Investigator		9/25–26	9/13–14	K	R. K. O.	844	656.45
Sins of Man		9/18–19	9/15–16	K	Fox	766	214.30
Poor Little Rich Girl		9/6–8	9/17–19	B	Fox	1,749	696.05
Bride Walks Out		9/23–24	9/20–21	K	R. K. O.	674	830.40
Suzy		9/13–15	9/22–24	B	Metro	1,212	522.95
Country Beyond		9/4–5	9/25–26	B	Fox	731	493.95
Green Pastures		9/30–10/1	9/27–28	K	W. B.	349	592.35
Rhythm on the Range		9/20–22	9/29–10/1	B	Par.	1,544	859.45
The Devil Doll		9/16–17	10/2–3	B	Metro	574	589.95
Little Miss Nobody		10/9–10	10/4–5	K	Fox	832	852.35
Earthworm Tractors		9/27–29	10/6–8	B	W. B.	1,267	679.40
One Rainy Afternoon		9/16–17	10/9–10	B	U. A.	574	425.65
3 Cheers for Love		10/14–15	10/11–12	K	Par.	543	809.20
To Mary—With Love		10/4–6	10/13–15	B	Fox	1,036	667.35
SCHEDULE XI (5)							
Spendthrift	*1936*	10/7–8	10/16–17	B	Par.	547	436.90
Sing Baby Sing		10/25–24	10/18–19	K	Fox	845	903.75
His Brother's Wife		10/11–13	10/20–22	B	Metro	1,347	793.15
White Fang		10/16–17	10/23–24	B	Fox	691	430.20
Yours for the Asking		10/28–29	10/25–26	K	Par.	417	779.65
Mary of Scotland		10/21–22	10/27–28	B	R. K. O.	316	237.75
China Clipper		10/18–20	10/29–31	B	W. B.	1,497	598.90

SCHEDULE XI (5) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Picadilly Jim	11/11-12	11/1-2	K	Metro	648	1,000.05
General Died at Dawn	10/25-27	11/3-5	B	Par.	1,352	737.60
C. Chan. at Racetrack	10/30-31	11/6-7	B	Fox	690	481.10
Great Ziegfeld	11/1-5	11/8-12	B	Metro	2,282	1,763.65
My American Wife	11/6-7	11/13-14	B	Par.	738	512.75
Last of the Mohicans	11/26-28	11/15-16	K	U. A.	1,369	944.40
Gorgeous Hussy	11/8-10	11/17-19	B	Metro	1,097	660.60
Girls' Dormitory	11/13-14	11/20-21	B	Fox	900	720.80
Texas Rangers	12/4-5	11/22-23	K	Par.	790	968.60
Satan Met a Lady	11/18-19	11/24-25	B	W. B.	522	404.45
Springtime	11/22-25	11/26-28	B	R. K. O.	1,501	1,058.60
Give Me Your Heart	12/2-3	11/29-30	K	W. B.	499	726.60
Anthony Adverse	11/15-17	12/1-3	B	W. B.	1,060	554.50
Pepper	11/20-21	12/4-5	K	Fox	790	618.85
Davis Is a Sissy	12/11-12	12/6-7	K	Metro	943	959.60
Dodsworth	11/29-12/1	12/8-10	B	U. A.	1,091	657.00
Second Wife	12/9-10	12/11-12	B	R. K. O.	554	538.20
Road to Glory	12/16-17	12/13-14	K	Fox	469	761.05
Libeled Lady	12/6-8	12/15-17	B	Metro	1,184	550.90
Dimples	12/13-15	12/18-19	B	Fox	1,244	601.10
Old Hutch	12/25-26	12/20-22	K	Metro	925	785.70
Bengal Tiger	12/18-19	12/23-24	B	W. B.	490	106.95
Ramona	12/20-22	12/25-26	B	Fox	937	753.30
Pigskin Parade	12/30-31	12/27-29	K	Fox	610	1,209.40
Sworn Enemy	12/23-24	12/30-31	B	Metro	188	276.45

SCHEDULE XI (6)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Big Broadcast of 1937	*1936*	12/27/29	1/1–2		Par.	1,537	1,188.35
Gay Desperado	*1937*	1/8–9	1/3–4	K	U. A.	684	446.05
Cain and Mabel			1/5–7		W. B.		651.65
Ladies in Love		1/6–7	1/8–9	B	Fox	606	667.10
Stage Struck		1/15–16	1/10–11	K	W. B.	863	859.85
Charge of the Light Brigade		1/3–5	1/12–14	B	W. B.	1,205	660.55
Woman Rebels		1/13–14	1/15–16	B	R. K. O.	406	519.50
Tarzan Escapes		1/21–23	1/17–18	K	Metro	974	819.35
Go West Young Man		1/10/12	1/19–21	B	Par.	1,463	611.80
One Way Passage		2/10–11	1/22–23	K	W. B.	424	628.80
Polo Joe		1/29–30	1/24–25	K	W. B.	814	767.20
Love on the Run		1/17–18	1/26–28	B	Metro	1,175	780.10
Valiant is the Word for Carrie		1/27–28	1/29–30	B	Par.	445	604.65
3 Men on a Horse		2/3–4	1/31–2/1	K	W. B.	600	965.25
Come and Get It		1/24–26	2/2–4	B	U. A.	1,154	638.05
Winter Set		1/19–20	2/5–6	B	R. K. O.	589	667.85
Hideaway Girl		2/17–18	2/7–8	K	Par.	547	830.00
Born to Dance		1/31–2/21	2/9–11	B	Metro	1,391	773.30
Reunion		2/5–6	2/12–13	B	Fox	712	623.95
Banjo on My Knee		2/24–25	2/14–15	K	Fox	578	873.00
College Holiday		2/7–9	2/16–18	B	Par.	1,726	799.20
Midsummer's Night Dream			2/17–18		W. B.		99.65
Can This be Dixie		2/12–13	2/19–20	B	Fox	742	622.70
Wanted Jane Turner		2/26–27	2/21–22	K	R. K. O.	662	537.70
After the Thin Man		2/14–16	2/23–25	B	Metro	1,682	841.40

SCHEDULE XI (6) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Jungle Princess	2/19–20	2/26–27	B	Par.	662	594.15
Garden of Allah	3/3–4	2/28–31	K	U. A.	640	902.15
Stowaway	2/21–23	3/2–4	B	Fox	1,722	741.90
Smartest Girl in Town	3/12–13	3/5–6	K	R. K. O.	649	672.40
Camile	3/9–11	3/7–8	K	Metro	746	897.55
Golddiggers of 1937	2/28–3/2	3/9–11	B	W. B.	1,314	566.55
SCHEDULE XI (7)						
Sing Me a Love Song *1937*	3/5–6	3/12–13	B	W. B.	657	414.25
God's Country and the Woman	3/19–20	3/14–15	K	W. B.	790	807.20
Champagne Waltz	3/7–8	3/16–18	B	Par.	1,238	621.60
Cloistered	3/17–18	3/19–20	B	Best Films	952	657.00
The Plainsman	3/14–16	3/21–23	B	Par	1,380	1,108.75
Rembrandt		3/24–25		U. A.		126.20
Black Legion	3/24–25	3/26–27	B	W. B.	479	359.20
Rainbow on the River	4/1–3	3/28–29	K	R. K. O.	1,370	1,112.95
Lloyds of London	3/21–23	3/30–4/1	B	Fox	1,243	625.80
Doctor's Diary	4/7–8	4/2–3	K	Par	679	516.65
The Holy Terror	4/9–10	4/4–5	K	Fox	896	814.85
One in a Million	3/28–31	4/6–8	B	Fox	2,090	710.35
Dangerous Number	4/7–8	4/9–10	B	Metro	679	474.30
That Girl from Paris	4/16–17	4/11–12	K	R. K. O.	795	636.20
Last of Mrs. Cheyney	4/4–6	4/13–15	B	Metro	1,350	589.75
Stolen Holiday	4/14–15	4/16–17	B	W. B.	512	509.35
Sea Devils	4/30–5/1	4/18–19	K	R. K. O.	650	849.25

SCHEDULE XI (7) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
On The Avenue	4/11–13	4/20–22	B	Fox	1,609	646.60
John Meade's Woman	4/21–22	4/23–24	B	Par	559	501.15
Maid of Salem	5/5–6	4/25–26	K	Par	614	895.00
Green Light	4/18–20	4/27–29	B	W. B.	1,410	713.50
Beloved Enemy	4/23–24	4/30–5/1	B	U. A.	640	352.70
The Great O'Malley	5/7–8	5/2–3	K	W. B.	691	650.20
Love is News	4/25–27	5/4–6	B	Fox	1,462	664.30
We Who Are About to Die	4/28–29	5/7–8	B	R. K. O.	501	352.40
When's Your Birthday	5/14–15	5/9–10	K	R. K. O.	665	820.65
You Only Live Once	5/2–4	5/11–13	B	U. A.	914	429.30
Clough and the Stars	5/12–13	5/14–15	B	R. K. O.	654	515.00
Ready, Willing and Able	5/21–22	5/16–17	K	W. B.	692	885.50
Swing High, Swing Low	5/9–11	5/18–20	B	Par	1,261	513.75
Men are Not Gods	5/19–20	5/21–22	B	U. A.	570	404.50
SCHEDULE XI (8)						
Quality Streets *1937*	6/2–3	5/23–24	K	R. K. O.	400	656.60
Personal Property	5/16–18	5/25–27	B	Metro	1,620	632.00
Nancy Steel is Missing	6/4–5	5/28–29	K	Fox	512	347.20
Maytime	5/23–25	5/30–6/1	B	Metro	929	663.65
The Outcast	5/26–27	6/2–3	B	Par	565	216.55
King and the Chorus Girl	5/28–29	6/4–5	B	W. B.	659	494.00
Seventh Heaven	6/9–10	6/6–7	K	Fox	732	706.50
Romeo and Juliet	6/16–17	6/8–9	K	Metro	320	273.60
Waikiki Wedding	5/30–6/1	6/10–12	B	Par.	1,553	878.00

SCHEDULE XI (8) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
History is Made at Night	6/23–24	6/13–14	K	U. A.	460	711.79
Marked Woman	6/6–8	6/15–17	B	W. B.	1,134	605.60
Roads to Town	6/11–12	6/18–19	B	Fox	590	530.15
Prince and the Pauper	6/25–26	6/20–21	K	W. B.	564	533.05
Wake Up and Live	6/13–15	6/22–24	B	Fox	1,085	470.80
Family Affair	6/18–19	6/25–26	B	Metro	422	295.60
Woman I Love	6/30–7/1	6/27–28	K	R. K. O.	445	541.15
Cafe Metropole	6/20–22	6/29–7/1	B	Fox	1,149	600.45
Call It a Day	7/7–8	7/2–3	K	W. B.	371	367.40
Angels' Holiday	7/9–10	7/4–5	K	Fox	527	523.45
Shall We Dance	6/27–29	7/6–8	B	R. K. O.	1,102	406.55
Girl From Scotland Yard	7/2–3	7/9–10	B	Par	502	339.15
Good Old Soak	7/16–17	7/11–12	K	Metro	498	584.70
I Met Him in Paris	7/4–6	7/13–15	B	Par	626	838.90
Time Out for Romance	7/21–22	7/16–17	K	Fox	450	385.65
The Go Getter	7/23–24	7/18–19	K	W. B.	499	456.60
A Star is Born	7/11–13	7/20–22	B	U. A.	940	642.40
Internes Can't Take Money	7/14–15	7/23–24	B	Par	734	465.25
Turn Off The Moon	7/30–31	7/25–26	K	Par	477	683.45
Parnell	7/18–20	7/27–29	B	Metro	1,019	653
Night Must Fall	7/28–29	7/30–31	B	Metro	553	432.25
Riding On Air	8/6–7	8/1–2	K	R. K. O.	528	552.85

SCHEDULE XI (9)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
They Gave Him a Gun *1937*	7/25–27	8/3–5	B	Metro	1,738	667.95
Mountain Justice	8/4–5	8/6–7	B	W. B.	615	443.10
Hotel Haywire	8/13–14	8/8–9	K	Par	586	367.40
Kid Galahad	8/1–3	8/10–12	B	W. B.	1,243	811.10
King of Gamblers	8/11–12	8/13–14	B	Par	675	408.10
Sing and Be Happy	8/20–21	8/15–16	K	Fox	571	401.90
A Day at the Races	8/8–10	8/17–19	B	Metro	1,521	799.10
Married Before Breakfast		8/20–21		Metro		418.60
Shin and Disney Revue	8/27–28	8/22–23	K	W. B.	711	774.15
This is My Affair	8/15–17	8/24–26	B	Fox	1,185	665.15
Manhattan Melodrama	8/25–26	8/27–28	B	Metro	683	589.75
Emperor's Candlesticks	9/3–4	8/29–30	K	Metro	919	663.40
Mountain Music	8/22–24	8/31–9/2	B	Par	1,709	658.60
Another Dawn	9/1–2	9/3–4	B	W. B.	568	392.45
Easy Living	9/10–11	9/5–6	K	Par	660	1,037.30
Saratoga	8/29–31	9/7–9	B	Metro	1,325	1,013.80
No Man of Her Own	9/8–9	9/10–11	B	Par	692	582.80
Singing Marine	9/17–18	9/12–13	K	W. B.	803	914.60
Last Train From Madrid	9/22–23	9/14–15	K	Par	511	471.05
Captain Courageous	9/5–7	9/16–18	B	Metro	1,628	935.65
Between Two Women	10/6–7	9/19–20	K	Metro	634	802.80
The Good Earth	9/12–14	9/21–23	B	Metro	1,467	799.75
Woman Chases Man	9/15–16	9/24–25	B	U. A.	679	521.20
New Faces of 1937	10/1–2	9/26–27	K	R. K. O.	868	872.10
Wee Willie Winkie	9/19–21	9/28–30	B	Fox	1,509	765.20

SCHEDULE XI (9) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Exclusive	9/24–25	10/1–2	B	Par	891	586.55
There Goes My Girl	10/8–9	10/3–4	K	R. K. O.	698	722.70
You Can't Have Everything	9/26–28	10/5–7	B	Fox	1,532	682.65
Knight Without Armor	9/29–30	10/8–9	B	U. A.	567	536.90
Topper	10/14–16	10/10–11	K	Metro	986	1,002.35
Slave Ship	10/3–5	10/12–14	B	Fox	1,695	742.90

SCHEDULE XI (10)

Ever Since Eve	*1937*	10/27–28	10/15–16	K	W. B.	593	583.30
San Quentin		10/20–21	10/17–18	K	W. B.	678	823.80
Broadway Melody, 1938		10/10–12	10/19–21	B	Metro	1,652	714.70
You Can't Beat Love		10/13	10/22–23	B	R. K. O.	370	488.90
Make a Wish		10/29–30	10/24–26	K	R. K. O.	663	831.90
Stella Dallas		10/17–19	10/27–28	B	U. A.	1,655	696.60
Hell Drivers		10/22–23	10/29–30	B	Metro	772	629.70
Wild and Wooly		11/5–6	10/31–11/1	K	Fox	786	817.65
Artists and Models		10/24–26	11/2–4	B	Par	1,699	872.30
Love Under Fire		11/3–4	11/5–6	B	Fox	712	710.05
Vogues of 1938		11/11–13	11/7–8	K	U. A.	1,086	771.20
Souls at Sea		10/30–11/1	11/9–11	B	Par	1,329	875.90
Confession		11/17–18	11/12–13	K	W. B.	510	587.75
Toast of New York		11/19–20	11/14–15	K	R. K. O.	824	882.45
Thin Ice		11/7–9	11/16–18	B	Fox	1,808	817.60
Behind The Headlines		11/24	11/19–20	K	R. K. O.	310	590.10
Dead End		11/14–16	11/21–22	B	U. A.	1,756	932.90

SCHEDULE XI (10) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Life of The Party	12/3–4	11/23–25	K	R. K. O.	871	460.50
Varsity Show	11/21–23	11/26–27	B	W. B.	1,452	1,121.15
Wife, Doctor, Nurse	11/30–12/2	11/28–29	K	Fox	991	1,022.90
Double or Nothing	11/25–27	11/30–12/2	B	R. K. O.	1,840	758.75
Dance Charlie, Dance		12/3–4		W. B.		500.10
Big City	12/9–11	12/5–6	K	Metro	1,569	906.50
Bride Wore Red	11/28–29	12/7–9	B	Metro	1,095	475.75
That Certain Woman	12/15–16	12/10–11	K	W. B.	406	433.25
This Way Please	12/17–18	12/12–13	K	Par.	575	569.00
Double Wedding	12/5–7	12/14–16	B	Metro	1,569	631.05
Talent Scout	12/8–9	12/17–18	B	W. B.	412	335.75
Life of Emily Zola	12/12–14	12/19–21	B	W. B.	1,126	845.65
Madame X	1937	12/22–24		Metro		217.60
Life Begins at College	12/19–21	12/25–26	B	Fox	1,341	851.80
SCHEDULE XI (11)						
Angel *1937*	12/22–24	12/27–28	B	Par.	318	493.50
Heidi	12/25–28	12/29–31	B	Fox	1,829	733.70
SCHEDULE XI (12)						
Firefly *1938*	1/3–5	1/1–2	K	Metro	862	1,235.45
Ali Baba Goes to Town	1/1–2	1/3–4	B	Fox	1,057	675.10
High, Wide and Handsome	1936	1/5–8		Par.		906.00
Perfect Specimen	1/14–15	1/9–10	K	W. B.	803	671.95
Prisoner of Zenda	1/6–8	1/11–13	B	U. A.	1,682	770.10
Fit For a King	1/21–22	1/14–15	K	R. K. O.	862	700.90

SCHEDULE XI (12) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
52nd Street	1/28–29	1/16–17	K	U. A.	769	701.75
Stage Door	1/9–11	1/18–20	B	R. K. O.	1,478	814.40
Second Honeymoon	1/19–20	1/21–22	B	Fox	713	761.15
Ebb Tide	2/3–5	1/23–24	K	Par.	1,175	950.30
Last Gangster	1/16–18	1/25–27	B	Metro	1,327	651.60
Conquest	1/26–27	1/28–29	B	Metro	510	607.55
Damsel In Distress	2/10–12	1/30–31	K	R. K. O.	1,017	787.75
Nothing Sacred	1/23–25	2/1–2	B	U. A.	1,461	782.70
Victoria the Great	2/9	2/4–5	K	R. K. O.	315	586.35
Submarine D–1	2/17–19	2/6–7	K	W. B.	1,302	978.15
Partners in Crime	2/2	2/8–9	B	Par.	330	439.65
Navy Blue and Gold	1/30–2/1	2/10–12	B	Metro	1,439	922.25
Stand In	2/25–26	2/13–14	K	U. A.	706	772.65
Love and Kisses	2/6–8	2/15–17	B	Fox	1,501	708.25
Thorobreds Don't Cry	2/22–24	2/18–19	K	Metro	1,115	672.65
45 Fathers	3/4–5	2/20–21	K	Fox	683	847.65
Wells Fargo	2/13–15	2/22–24	B	Par.	1,498	997.15
First Lady	2/16	2/25–26	B	W. B.	376	634.15
Tarzan's Revenge	3/11–12	2/27–28	K	Fox	646	723.45
True Confession	2/20–21	3/1–3	B	Par.	1,220	685.35
Manhattan Merry Go Round		3/4–5		Rep.		553.75
Every Day's a Holiday	3/16–17	3/6–7	K	Par.	763	709.00
Beg Borrow or Steal	3/2–3	3/8–9	B	Metro	430	386.85
Rosalie	2/27–3/1	3/10–12	B	Metro	1,370	969.25
Alcatraz Island	3/18–19	3/13–14	K	W. B.	739	792.30

SCHEDULE XI (13)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Mannequin	*1938*	3/6–8	3/15–17	B	Metro	1,556	808.45
It's Love I'm After		3/9–10	3/18–19	B	W. B.	543	488.40
Man Proof		3/25–26	3/20–21	K	Metro	739	761.45
Tovarish		3/13–15	3/22–24	B	W. B.	1,463	747.30
Wise Girl		3/23–24	3/25–26	B	R. K. O.	497	553.60
Badmen of Brimstone		4/7–9	3/27–28	K	Metro	708	897.10
Hollywood Hotel		3/20–22	3/29–31	B	W. B.	1,129	569.40
Paradise for Three		3/30–31	4/1–2	B	Metro	511	588.50
I Met My Love Again		4/6	4/3–4	K	U. A.	297	673.75
Hurricane		3/27–29	4/5–7	B	U. A.	1,745	787.90
The Barrier		4/1–2	4/8–9	B	Par.	804	639.20
Happy Landing		4/3–5	4/10–12	B	Fox	1,673	1,166.45
Paradise Town		4/15–16	4/12–13	K	W. B.	433	244.65
You're Only Young Once		4/13–14	4/15–16	B	Metro	383	272.60
Everybody Sing		4/22–23	4/17–18	K	Metro	1,197	842.05
A Yank at Oxford		4/10–12	4/19–21	B	Metro	1,599	964.90
Checkers		4/29–30	4/22–23	K	Fox	738	601.30
Sally, Irene and Mary		4/20–21	4/24–25	B	Fox	869	907.30
Baroness and The Butler		4/27–28	4/26–27	K	Fox	382	335.40
The Buccanier		4/17–19	4/28–30	B	Par.	1,366	761.70
Bringing Up Baby		5/6–7	5/1–2	K	R. K. O.	608	924.55
Goldwyn Follies		4/24–26	5/3–5	B	U. A.	1,195	598.00
Romance in The Dark		5/12	5/6–7	K	Par.	201	508.10
Hawaii Calls		5/13–14	5/8–9	K	R. K. O.	772	791.30
Hitting a New High			5/10–11		R. K. O.		330.80

SCHEDULE XI (13) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Snow White and Seven Dwarfs	5/1–5	5/12–14	B	R. K. O.	2,108	1,245.80
Big Broadcast of 1938	5/20–21	5/15–16	K	Par.	740	829.45
Bluebeard's 8th Wife	5/8–11	5/17–19	B	Par.	2,137	742.75
King of Newsboys		5/20–21		Rep.		417.10
Merrily We Live	5/26–28	5/22–23	K	Metro	588.00	570.70
Radio City Revels	6/1–2	5/24–25	K	R. K. O.	487	439.30

SCHEDULE XI (14)

In Old Chicago	*1938*	5/15–19	5/26–28	B	Fox	2,328	835.60
Kid Comes Back		6/3–4	5/29–30	K	W. B.	645	665.90
Dangerous to Know		5/25	5/31–6/1	B	Par.	208	243.15
Rebecca of Sunnybrook Farm		5/22–24	6/2–4	B	Fox	1,300	934.60
Jezebel		6/22–23	6/5–6	K	W. B.	406	776.00
Slight Case of Murder		5/29–31	6/7–9	B	W. B.	1,137	648.80
First 100 Years		6/8–9	6/10–11	B	Metro	458	509.95
Judge Hardy's Children		6/17–18	6/12–13	K	Metro	706	887.90
Girl of Golden West		6/6–7	6/14–16	B	Metro	1,357	553.55
Gold is Where You Find It		6/10–11	6/17–18	B	W. B.	610	531.65
Adventures Tom Sawyer		6/24–25	6/19–20	K	U. A.	745	895.70
Condemned Woman		6/16	6/21–22	B	R. K. O.	108	267.70
Test Pilot		6/12–15	6/23–25	B	Metro	1,992	939.50
Her Jungle Love		7/1–2	6/26–27	K	Par.	802	974.15
Doctor Rhythm		6/19–21	6/28–30	B	Par.	1,310	662.65
Joy of Living		6/29–30	7/1–2	B	R. K. O.	646	680.15
Kentucky Moonshine		7/8–9	7/3–4	K	Fox	680	811.30

SCHEDULE XI (14) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Vivacious Lady	6/26–28	7/5–7	B	R. K. O.	1,425	728.80
Fools for Scandal	7/6–7	7/8–9	B	W. B.	386	381.15
Beloved Brat	7/15–16	7/10–11	K	W. B.	639	549.60
Battle of Broadway	7/13–14	7/12–13	K	Fox	352	312.15
Adventures of Robin Hood	7/3–5	7/14–16	B	W. B.	1,149	1,004.35
Law of the Underworld	7/21	7/17–18	K	R. K. O.	249	606.35
Adventures of Marco Polo	7/10–12	7/19–21	B	U. A.	1,103	604.95
You and Me	7/27–28	7/22–23	K	Par.	424	481.50
Cocoanut Grove	7/29–30	7/24–25	K	Par.	633	479.65
Three Comrades	7/17–20	7/26–28	B	Metro	1,988	712.70
Over the Wall	7/22–23	7/29–30	B	W. B.	495	361.75
Kidnapped	8/5–6	7/31–8/1	K	Fox	738	830.90
Three Blind Mice	7/24–26	8/2–4	B	Fox	999	617.00
Josette	8/3–4	8/5–6	B	Fox	516	482.15

SCHEDULE XI (15)

Yellow Jack *1938*	8/12–13	8/7–8	K	Metro	679	508.75
Having Wonderful Time	7/31–8/2	8/9–11	B	R. K. O.	1,128	621.25
Four Men and a Prayer	8/10–11	8/12–13	B	Fox	694	569.85
Crime School	8/19–20	8/14–15	K	W. B.	869	759.95
Toy Wife	8/24–25	8/16–17	K	Metro	582	369.35
Tropic Holiday	8/7–9	8/18–20	B	Par	1,103	619.70
Lord Jeff	8/26–27	8/21–22	K	Metro	810	638.75
Shopworn Angel	8/14–16	8/23–25	B	Metro	830	692.50
Gold Diggers in Paris	8/17–18	8/26–27	B	W. B.	569	558.90

SCHEDULE XI (15) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
White Banners	9/2–3	8/28–29	K	W. B.	744	728.35
Port of Seven Seas	8/21–23	8/30–9/1	B	Metro	1,120	766.10
Always Goodbye	8/31–9/1	9/2–3	B	Fox	566	534.60
Professor Beware	9/8–10	9/4–5	K	Par.	939	999.70
My Bill		9/6–8		W. B.		406.90
Little Miss Broadway	8/28–30	9/9–10	B	Fox	1,320	856.85
Cowboy From Brooklyn	9/16–17	9/11–12	K	W. B.	868	870.95
Woman Against Woman	9/7	9/13–14	B	Metro	427	465.70
The Texans	9/4–6	9/15–17	B	Par.	1,590	670.85
Amazing Dr. Cliterhouse	9/23–24	9/18–19	K	W. B.	481	906.50
I'll Give a Million	9/21–22	9/20–21	K	Fox	897	415.30
Love Finds Andy Hardy	9/11–15	9/22–24	B	Metro	1,890	1,178.70
Mother Carey's Chickens	9/30–10/1	9/25–26	K	R. K. O.	898	841.35
Blockade	10/5–6	9/27–28	K	U. A.	573	492.50
Crowd Roars	9/18–20	9/29–10/1	B	Metro	1,517	949.55
In From the City	10/7–8	10/2–3	K	R. K. O.	758	640.70
Racket Busters	10/12–13	10/4–5	B	W. B.	627	463.20
Alexander's Ragtime Band	9/25–29	10/6–8	B	Fox	2,636	1,233.45
Give Me a Sailor	10/14–15	10/9–10	K	Par.	828	784.50
Rich Man, Poor Girl	10/19–20	10/11–12	K	Metro	516	683.55
My Lucky Star	10/2–4	10/13–15	B	Fox	1,543	977.00
Gateway	10/21–22	10/16–17	K	Fox	872	802.25

SCHEDULE XI (16)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Affairs of Annabel	*1938*	10/26–27	10/18–19	K	R. K. O.	427	357.05
Spawn of the North		10/9–11	10/20–22	B	Par.	1,695	954.15
Breaking the Ice		10/28–29	10/23–24	K	R. K. O.	672	645.00
Secrets of An Actress		11/2–3	10/25–26	K	W. B.	482	371.30
Carefree		10/16–18	10/27–29	B	R. K. O.	1,406	911.00
Three Loves Has Nancy		11/4–5	10/30–31	K	Metro	808	911.65
Smashing the Rackets		11/10	11/1–2	K	R. K. O.	211	393.40
Sing You Sinners		10/23–25	11/3–5	B	Par.	1,678	1,063.50
Hold That Co-ed		11/11–12	11/6–7	K	Fox	875	816.05
Marie Antoinette		10/30–11/1	11/8–10	B	Metro	1,046	797.05
Four's a Crowd		11/16–17	11/11–12	K	W. B.	636	984.65
Touchdown Army		11/18–19	11/13–14	K	Par.	616	656.60
King of Alcatraz		11/30–12/1	11/15–16	K	Par.	574	463.85
Too Hot to Handle		11/6–9	11/17–19	B	Metro	1,958	1,118.40
Drums		12/2–3	11/20–21	K	U. A.	630	858.30
If I Were King		12/6/8	11/22–23	K	Par.	841	585.70
Valley of the Giants		11/13–15	11/24–26	B	W. B.	1,492	1,029.15
Boys Town		11/20–23	11/27–30	B	Metro	2,625	1,799.90
Straight, Place, Show		11/24–26	12/1–3	B	Fox	1,321	587.30
Arkansas Traveler		12/9–10	12/4–5	K	Par.	659	794.30
Room Service		11/27–29	12/6–8	B	R. K. O.	1,521	710.00
Garden of the Moon		12/14–15	12/9–10	K	W. B.	466	625.95
Mad Miss Marton		12/18–19	12/11–12	K	R. K. O.	1,066	850.20
Four Daughters		12/4–5	12/13–15	B	W. B.	1,193	503.85
Illegal Traffic		12/23–24	12/16–17	K	Par.	198	438.25

SCHEDULE XI (16) (*Continued*)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Suez		12/11–13	12/18–19	B	Fox	1,422	750.55
The Citadel		12/20–22	12/20–22	Same	Metro	372	423.90
Five of a Kind		12/16–17	12/23–24	B	Fox	429	223.25
Stablemates		12/28–31	12/25–27	K	Metro	1,279	1,358.70
Sisters	*1939*	1/4–5/39	12/28–29	K	W. B.	678	516.65
Just Around the Corner		1/6–7	12/30–31	K	Metro	826	662.65

SCHEDULE XI (17)

Men With Wings	*1939*		1/1–3		Par.		1,481.00
Great Waltz		1/11–12	1/4–5	K	Metro	726	419.15
Down in Arkansas			1/6–7		Rep.		578.55
Submarine Patrol		1/13–14	1/8–9	K	Fox	980	906.55
Shining Hour		1/1–3	1/10–12	B	Metro	1,935	881.60
There Goes My Heart		1/20–21	1/13–14	K	U. A.	869	739.60
Heart of the North		1/26–28	1/15–16	K	W. B.	938	710.05
Cowboy and the Lady		1/8–10	1/17–19	B	U. A.	1,663	713.65
Thanks for the Memory		1/18–19	1/20–21	B	Par.	676	694.45
Thanks for Everything		2/3–4	1/22–23	K	Fox	694	566.45
Frankenstein and Dracula		2/1–2	1/24–25	K	Univ.	481	441.75
Brother Rat		1/15–17	1/26–28	B	W. B.	1,613	1,032.50
Trade Winds		2/9–11	1/29–30	K	U. A.	1,198	826.50
Bat Whispers			1/31–2/2		Par.		383.85
Angels With Dirty Faces		1/22–25	2/3–4	B	W. B.	2,178	1,140.70
Devils Island			2/5–6		W. B.		744.85
Artists and Models Abroad		1/28–31	2/7–9	B	Par.	1,177	635.75

SCHEDULE XI (17) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Pacific Liner	2/15–16	2/10–11	K	R. K. O.	452	640.50
Young in Heart	2/24–25	2/12–13	K	U. A.	676	901.60
Star at Midnight	2/22–23	2/14–15	K	R. K. O.	581	563.00
Out West With the Hardys	2/5–8	2/16–18	B	Metro	1,983	1,030.20
Paris Honeymoon	3/3–4	2/19–20	K	Par.	764	837.55
Sweethearts	2/12–14	2/21–23	B	Metro	1,192	703.10
Topper Takes a Trip	3/10–11	2/24–25	K	U. A.	882	861.70
Zaza	3/8–9	2/26–27	K	Par.	536	751.05
Dramatic School	3/1–2	2/28–3/1	K	Metro	435	358.95
Kentucky	2/19–21	3/2–4	B	Fox	1,588	1,116.90
Fisherman's Wharf	3/17–18	3/5–6	K	R. K. O.	544	602.65
Persons in Hiding	3/15–16	3/7–8	K	Par.	320	301.45
Dawn Patrol	2/26–28	3/9–11	B	W. B.	1,512	920.70
Duke of West Point	3/24–25	3/12–13	K	U. A.	649	596.40

SCHEDULE XI (18)

Four Girls in White	*1939*	3/22–23	3/14–15	K	Metro	627	517.55
Stand Up and Fight		3/5–7	3/16–18	B	Metro	1,587	852.40
King of Underworld		4/6	3/19–20	K	W. B.	133	675.90
Secrets of a Nurse		4/11–13	3/21–22	K	Univ.	1,231	438.45
They Made Me a Criminal		3/13–14	3/23–25	B	W. B.	1,384	812.90
Wings of the Navy		3/30–4/1	3/26–27	K	W. B.	993	819.30
Idiot's Delight		3/18–21	3/28–30	B	Metro	1,180	586.00
Cipher Bureau		4/7–8	3/31–4/1	K	R. K. O.	513	525.15
Gunga Din		3/26–29	4/2–4	B	R. K. O.	1,642	1,062.95

SCHEDULE XI (18) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Beauty for the Asking		4/5–6		R. K. O.		169.96
Pride of the Navy		4/7–8		Rep.		377.15
You Can't Cheat an Honest Man	4/14–15	4/9–10	K	Univ.	786	829.35
Adv. of Huckleberry Finn	4/9–10	4/11–13	B	Metro	1,327	795.10
Honolulu	4/11–13	4/14–15	B	Metro	1,231	976.45
St. Louis Blues	4/21–22	4/16–17	K	Par.	771	819.05
Yes My Darling Daughter	4/26–27	4/18–19	K	W. B.	588	607.80
Jesse James	4/2–5	4/20–22	B	Fox	2,008	1,100.05
Three Musketeers	4/28–29	4/23–24	K	Fox	903	486.55
Made for Each Other	4/16–18	4/25–26	B	U. A.	1,215	602.55
Wife, Husband, Friend	4/19–20	4/27–29	B	Fox	722	573.75
Pygmalian	5/2–4	4/30–5/1	K	Metro	717	829.10
Prison Without Bars	5/12–13	5/2–3	K	U. A.	516	498.50
Stagecoach	4/23–25	5/4–6	B	U. A.	1,418	931.90
Little Princess	5/14–16	5/7–9	K	Fox	1,154	1,154.70
Love Affair	4/30–5/1	5/10–11	B	R. K. O.	802	485.95
Ice Follies of 1939	5/5–6	5/12–13	B	Metro	683	529.90
Midnight	5/21–23	5/14–16	K	Par.	848	1,030.05
Beachcomber	5/10–11	5/17–18	B	Par.	558	500.45
Blackwells Island	5/17–18	5/19–20	K	W. B.	475	488.50
Vernon and Irene Castle	5/28–29	5/21–23	K	R. K. O.	587	955.55
Bay Slaves	5/26–27	5/24–25	K	R. K. O.	382	283.30

SCHEDULE XI (19)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Oklahoma Kid *1939*		5/26–27		W. B.		409.85
Dodge City	6/4–6	5/28–30	K	W. B.	1,146	1,542.40
Sergeant Madden	6/2–3	5/31–6/1	K	Metro	525	399.60
I'm From Missouri	6/9–10	6/2–3	K	Par.	383	431.20
Hardy's Ride High	6/11–13	6/4–6	K	Metro	1,446	1,380.50
Hound of Baskervilles		6/7–8		Fox		387.00
Return of Cisco Kid	6/16–17	6/9–10	K	Fox	542	520.50
Dark Victory	6/18–20	6/11–13	K	W. B.	1,051	1,385.25
Lady's From Kentucky	6/21–22	6/14–15	K	Par.	296	349.45
Let Freedom Ring	6/23–24	6/16–17	K	Metro	356	531.90
Wuthering Heights	6/25–27	6/18–20	K	U. A.	665	915.10
You Can't Get Away With Murder	6/28–29	6/21–22	K	W. B.	242	326.80
Alexander G. Bell	6/30–7/1	6/23–24	K	Fox	508	702.60
Union Pacific	7/2–4	6/25–27	K	Par.	864	1,107.35
Some Like It Hot	7/5–6	6/28–29	K	Par.	447	310.15
Confessions of a Nazi Spy	7/7–8	6/30–7/1	K	W. B.	520	711.10
Rose of Washington Square	7/9–11	7/2–4	K	Fox	1,032	1,146.45
Bridal Suite	7/12–13	7/5–6	K	Metro	339	353.70
Juarez	7/14–15	7/7–8	K	W. B.	672	672.45
It's a Wonderful World	7/16–18	7/9–11	K	Metro	829	909.80
Gracie Allen Murder Case	7/19–20	7/12–13	K	Par.	305	400.15
Captain Fury	7/21–22	7/14–15	K	U. A.	382	679.75
Lucky Night	7/23–25	7/16–18	K	Metro	875	1,207.40
The Gorilla	7/26–27	7/19–20	K	Fox	370	423.00

SCHEDULE XI (19) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Young Mr. Lincoln	7/28–29	7/21–22	K	Fox	329	470.00
Invitation to Happiness	7/30–31	7/23–25	K	Par.	672	769.15
Maisie		7/26–27		Metro		509.05
Tarzan Finds a Son		7/28–29		Metro		780.25
Man About Town		7/30–8/1		Par.		1,111.40

SCHEDULE XI (20)

Panama Lady 1939		8/2–3/39		R. K. O.		309.45
Kid from Kokomo	8/16–17/39	8/4–5	K	W. B.	395.65	615.10
On Borrowed Time		8/6–8		Metro		879.55
Mutiny of Elsinore		8/9–10		Prin.		418.90
Hell's Kitchen	8/18–19	8/11–12	K	W. B.	566.30	489.35
Second Fiddle	8/24–26	8/13–15	K	Fox	765.10	1,151.25
Five Came Back	9/10–13	8/16–17	K	R. K. O.	939.95	576.00
Susannah of Mounties	8/27–29	8/18–19	K	Fox	767.55	617.15
Man in Iron Mask	9/3–5	8/20–22	K	U. A.	1,151.90	1,246.50
Million Dollar Legs		8/23–24		Par.		424.50
Winter Carnival	9/24–26	8/25–26	K	U. A.	1,027.25	636.65
A. Hardy Gets Spring Fever		8/27–30		Metro		1,852.15
Stolen Life		8/31		Par.		126.20
Way Down South	9/10–13	9/1–2	K	R. K. O.	939.95	264.75
Bachelor Mother	9/14–16	9/3–5	K	R. K. O.	652.25	1,012.00
Magnificent Fraud		9/6–7		Par.		423.00
Indianapolis Speedway	10/4–5	9/8–9	K	W. B.	328.84	596.25
Each Dawn I Die	9/20–21	9/10–12	K	W. B.	607.30	1,179.25
Island of Lost Men		9/13–14		Par.		484.75

SCHEDULE XI (20) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Frontier Marshal	9/24–26	9/15–16	K	Fox	1,027.25	442.25
Four Feathers	9/27–30	9/17–19	K	U. A.	1,065.60	1,038.00
Hotel for Women	10/11–12	9/20–21	K	Fox	386.85	397.00
Our Leading Citizens		9/22–23		Par.		412.75
Goodbye Mr. Chips		9/24–27		Metro		1,403.75
Lady of Tropics		9/28–29		Metro		1,003.75
Stanley and Livingston	10/8–9	10/1–3	K	Fox	1,171.75	1,226.00
Of Human Bondage	11/1–2	10/4–5	K	R. K. O.	314.80	602.00
Heritage of the Desert		10/6–7		Par.		466.50
Star Maker		10/8–11		Par.		1,705.65
Wizard of Oz		10/12–14		Metro		1,344.60
Fifth Avenue Girl	10/26–28	10/15–16	K	R. K. O.	817.90	760.80

SCHEDULE XI (21)

In Name Only	*1939*	11/29–31	10/17–19/39	K	R. K. O.	1,330.35	776.45
Thunder Afloat		11/19–21	10/20–21	K	Metro	1,285.95	878.50
Beau Geste		11/8–11	10/22–24	K	Par.	942.15	1,287.05
Blackmail		11/22–23	10/25–26	K	Metro	893.95	512.50
Here I Am, Stranger			10/27–28		Fox		579.95
Rains Came		11/5–7	10/29–31	K	Fox	1,301.05	1,249.40
Espionage Agent			11/1–2		W. B.		483.75
$1,000 a Touchdown		11/12–13	11/3–4	K	Par.	968.80	688.00
The Women		11/15–18	11/5–7	K	Metro	1,040.90	1,497.60
Intermezzo		11/20–21	11/8–9	K	U. A.	158.55	456.75

SCHEDULE XI (21) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Nurse Edith Cavell	11/24–25	11/10–11	K	R. K. O.	600.25	675.35
The Old Maid		11/12–14		W. B.		1,339.40
My Man Godfrey		11/15		Univ.		247.85
All Quiet on Western Front		11/16–18		Univ.		898.40
Babes in Arms	11/26–29	11/19–22	K	Metro	1,712.70	1,971.80
Hollywood Cavalcade	11/30–12/1–2	11/23–25	K	Fox	1,012.55	1,388.85
Honeymoon in Bali	12/6–9	11/26–28	K	Par.	798.00	1,050.90
Dust Be My Destiny		11/29–30		W. B.		583.50
What a Life	12/17–19	12/1–2	K	Par.	799.60	414.25
Drums Along the Mohawk	12/10–12	12/3–6	K	Fox	1,497.95	1,777.50
Cat and Canary	12/29–30	12/7–9	K	Par.	591.80	1,039.00
Real Glory	12/24–26	12/10–12	K	U. A.	945.45	1,254.50
Pack Up Your Troubles	12/31–1/1–2	12/13–14	K	Fox	1,042.75	360.10
They Shall Have Music	12/22–23	12/15–16	K	U. A.	254.40	471.90
Private Lives of Eliz. and Sussex		12/17–19		W. B.		788.60
The Escape	12/29–30	12/20–21	K	Fox	591.80	325.75
Meet Dr. Christian *1940*	1/3–4/40	12/22–23	K	R. K. O.	338.70	424.80
Marx Bros. at Circus	1/5–6	12/24–25	K	Metro	534.35	635.90
Daytime Wife	12/31–1/1–2	12/26–28	K	Fox	1,042.75	590.40
Allegany Uprising	1/14–16	12/29–30	K	R. K. O.	1,496.55	700.00
Another Thin Man	1/10–13	12/31–1/1–2	K	Metro	1,274.50	2,148.45

SCHEDULE XI (22)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
1940						
That's Right Your Wrong	1/14–16	1/3–6/40	K	R. K. O.	1,496.25	1,024.70
Disputed Passage	1/21–23	1/7–9	K	Par.	907.45	1,036.45
Jamaica Inn	1/24–25	1/10–11	K	Par.	353.15	552.80
Remember	1/19–20	1/12–13	K	Metro	352.95	800.55
Roaring 20's	1/	1/14–16		W. B.		1,278.25
Eternally yours	2/15–17	1/17–18	K	U. A.	945.30	521.40
Rulers of the Sea	1/28–30	1/19–20	K	Par.	1,068.05	701.95
Ninotchka	1/31 2/1–3	1/21–23	K	Metro	1,172.25	1,212.45
Barricade	2/11–13	1/24–25	K	Fox	1,448.65	870.45
Housekeeper's Daughter	2/4–6	1/26–27	K	U. A.	1,405.25	764.95
Judge Hardy and Son	2/7–10	1/28–31	K	Metro	1,240.55	1,656.20
Everything Happens at Night	2/15–17	2/1–3	K	Fox	945.30	999.35
Swanee River	2/11–13	2/4–7	K	Fox	1,448.65	1,484.80
On Dress Parade	2/21	2/8–10	K	W. B.	259.70	797.30
Gulliver's Travels	2/22–24	1/11–12	K	Par.	926.40	1,070.95
Balalaika	2/25–27	2/13–15	K	Metro	1,050.10	619.30
Invisible Stripes	3/8–9	2/16–17	K	W. B.	576.75	744.65
Hunchback of Notre Dame	2/28–29 3/1–2	2/18–20	K	R. K. O.	968.80	921.90
Stage Door (reissue)		2/21		R. K. O.		621.30
Geronimo	3/3–5	2/22–24	K	Par.	1,126.80	950.20
Four Wives	3/6–7	2/25–27	K	W. B.	681.85	1,182.05
We Are Not Alone		2/28–29		W. B.		502.35
Congo Maisie	3/13–14	3/1–2	K	Metro	527.60	780.35
Great Victor Herbert	3/17–20	3/3–5	K	Par.	1,176.35	869.50

SCHEDULE XI (22) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Chump at Oxford	3/15–16	3/6–7	K	U. A.	507.60	739.95
Remember the Night	3/17–20	3/8–9	K	Par.	1,176.35	683.95
Raffles	3/21–23	3/10–12	K	U. A.	482.20	844.75
He Married His Wife	3/24–26	3/13–14	K	Fox	989.35	413.90
Slightly Honorable	3/24–26	3/15–16	K	U. A.	989.35	729.80
Shop Around Corner	3/31 4/1–2	3/17–19	K	Metro	1,091.70	1,128.20
Man Who Wouldn't Talk	4/9–4	3/20–21	K	Fox	541.15	809.40

SCHEDULE XI (23)

Return of Dr. X *1940*	4/5–6	3/22–23/40	K	W. B.	538.15	457.80
Broadway Melody of 1940	4/7–9	3/24–26	K	Metro	1,312.60	1,310.35
I Take This Woman	4/3–4	3/27–28	K	Metro	541.15	617.05
Swiss Family Robinson	4/7–9	3/29–30	K	R. K. O.	1,312.60	766.20
Fighting 69th	4/10–13	3/31 4/1–3	K	W. B.	1,378.00	1,638.50
Little Old New York	4/25–27	4/4–6	K	Fox	789.55	1,007.65
Grapes of Wrath	4/14–17	4/7–10	K	Fox	1,357.95	1,311.60
Man From Dakota	4/21–23	4/11–13	K	Metro	1,541.65	916.25
Visit in the Night	4/28–30	4/14–16	K	R. K. O.	7,74.85	1,127.55
Pinochio	4/18–20	4/17–20	K	R. K. O.	867.20	1,290.10
Northwest Passage	5/1–4	4/21–24	K	Metro	1,561.25	1,708.60
Seventeen	5/5–7	4/25–27	K	Para.	1,216.45	962.70
Of Mice and Men	5/10–11	4/28–30	K	U. A.	508.70	921.25
Three Cheers for the Irish	5/16–18	5/1–2	K	W. B.	747.50	809.10
Rancho Grande		5 3–4		Rep.		1,095.30
Road to Singapore	5/19–21	5/5–8	K	Par	1,077.75	1,787.45

SCHEDULE XI (23) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Bluebird	5/16–18	5/9–11	K	Fox	747.50	872.80
Young Tom Edison	5/26–28	5/12–14	K	Metro	909.00	1,035.65
Dr. Ehrlich's Magic Ballet	5/29–30	5/15–16	K	W. B.	682.70	520.45
Stardust	5/22–23	5/17–18	K	Fox	353.05	762.55
Rebecca	6/2–4	5/19–22	K	U. A.	660.60	1,256.15
20 Mule Team	6/7–8	5/23–25	K	Metro	458.70	1,148.30
My Son, My Son	6/14–15	5/26–27	K	U. A.	567.20	777.55
Light That Failed	6/12–13	5/28–29	K	Par.	340.50	438.25
Dr. Cyclops	6/21–22	5/30 6/1	K	Par.	561.00	1,232.95
Johnny Apollo	6/9–11	6/2–3	K	Fox	925.95	905.65
Primrose Path	6/19–20	6/4–6	K	R. K. O.	544.95	590.75
Castle on the Hudson	6/28–29	6/7–8	K	W. B.	569.65	584.20
Buck Benny Rides Again	6/23–25	6/9–12	K	Par.	1,467.60	1,339.00
One Million B. C.	6/23–25	6/13–15	K	U. A.	1,467.60	853.80
Irene	6/30 7/1–2	6/16–18	K	R. K. O.	1,015.18	912.85

SCHEDULE XI (24)

Till We Meet Again	*1940*	7/9–10	6/19–20/40	K	W. B.	285.47	567.60
House Across the Bay		7/26–27	6/21–22	K	U. A.	453.36	843.35
Waterloo Bridge		7/4–6	6/23–26	K	Metro	929.02	1,726.80
Dr. Kildare's Strange Case		7/7–8	6/27–29	K	Metro	520.60	1,076.80
Edison the Man		7/11–13	6/31 7/1–3	K	Metro	962.53	1,584.70
Typhoon		7/19–20	7/4–6	K	Par.	558.01	905.15
Lillian Russell		7/14–16	7/7–9	K	Fox	1,095.06	996.75
Those Were the Days			7/10–11		Par.		518.70

SCHEDULE XI (24) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Florian	7/24–25	7/12–13	K	Metro	248.43	471.00
Torrid Zone	7/28–30	7/14–16	K	W. B.	772.31	836.20
Way of All Flesh	7/31 8/1	7/17–18	K	Par.	367.27	405.30
Safari	8/2–3	7/19–20	K	Par.	480.48	689.40
My Favorite Wife	8/4–6	7/21–24	K	R. K. O.	726.06	1119.85
Our Town	8/11–13	7/25–27	K	U. A.	640.01	886.60
Susan and God	8/9–10	7/28–30	K	Metro	442.39	857.25
Four Sons	8/7–8	7/31 8/1	K	Fox	544.57	516.95
Sailor's Lady	8/9–10	8/2–3	K	Fox	442.39	529.25
Ghost Breakers	8/18–20	8/4–6	K	Par.	1,003.90	1,152.90
Bill of Divorcement	8/21–22	8/7–8	K	R. K. O.	347.02	373.50
Lost Horizon (reissue)		8/9–10		Col.		594.40
Mortal Storm	8/25–27	8/11–13	K	Metro	1,395.76	936.50
Man Talked Too Much	8/23–24	8/14–15	K	W. B.	597.03	804.25
Untamed	9/1–3	8/16–17	K	Par.	1,816.72	732.95
A. Hardy Meets Debutante	8/28–31	8/18–21	K	Metro	1,646.82	1,771.00
South of Pago Pago	9/1–3	8/22–24	K	U. A.	1,816.77	1,000.60
New Moon	9/8–9	8/25–27	K	Metro	784.16	1,251.75
Murder In the Air	9/12–14	8/28–29	K	W. B.	663.99	354.55
Sporting Blood	9/6–7	8/30–31	K	Metro	571.03	758.75
All This and Heaven Too	9/15–17	9/1–4	K	War	789.14	1,441.00
Pride and Prejudice	9/22–24	9/8–10	K	M. G. M.	768.65	1,158.00
Mary Land	9/12–14	9/5–7	K	Fox	663.99	1,108.00

SCHEDULE XI (25)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Man I Married	*1940*	9/18–19	9/11–12/40	K	Fox	516.85	541.00
Leopard Men of Africa			9/13–14		Par.		621.00
They Drive by Night		9/26–28	9/15–17	K	War.	1,105.16	1,364.00
Beyond Tomorrow		10/2	9/18–19	K	M. G. M.	310.99	515.00
Hell Below		10/2	9/20–21	K	M. G. M.	310.99	857.00
I Love You Again		10/3–5	9/22–25	K	M. G. M.	989.48	1,705.00
Young People		10/10–12	9/26–28	K	Fox	654.25	819.00
Return of J. James		10/6–9	9/29–30 10/1	K	Fox	1,366.45	1,165.00
We Who Are Young		10/16–17	10/2–3	K	M. G. M.	397.15	460.00
Anne of Windy Poplars		10/18–19	10/4–5	K	R. K. O.	489.26	750.00
Rhythm of the River		11/17–20	10/6–8	K	Par.	1,081.58	1,321.00
Public Deb. No. 1		10/23–24	10/9–10	K	Fox	415.03	427.00
Great McGinty		10/20–22	10/11–12	K	Par.	764.63	732.00
Wyoming		12/5–7	10/13–15	K	M. G. M.	731.23	1,029.00
Lucky Partners		10/25–26	10/16–17	K	R. K. O.	499.07	834.00
Men Against Sky		11/13–14	10/18–19	K	Fox	645.35	693.00
Foreign Correspondent		10/27–29	10/20–22	K	U. A.	854.15	1,230.00
Dance, Girl, Dance		11/24–26	10/23–24	K	R. K. O.	1,175.26	502.00
I Want a Divorce		12/11–12	10/25–26	K	Par.	327.74	757.00
Boom Town		11/6–9	10/27–31	K	M. G. M.	1,603.23	2,496.00
Carolina Moon			11/1–11/2		R. K. O.		568.00
Strike Up the Band		11/28–30	11/3–6	K	M. G. M.	949.30	1,909.00
Down Argentine Way		11/13–14	11/7–9	K	Fox	645.35	1,126.00
Strange Cargo		11/24–26	11/10–12	K	M. G. M.	1,175.26	1,305.00
Haunted Honeymoon		12/4	11/13–14	K	War.	197.94	456.00

SCHEDULE XI (25) *(Continued)*

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Brigham Young		11/21–23	11/15–16	K	Fox	1,225.85	691.00
The Westerner		12/1–3	11/17–20	K	U. A.	1,103.57	1,575.00
Knute Rockne		12/15–17	11/21–23	K	War.	840.45	1,446.00
Third Finger, Left Hand		12/8–10	11/24–27	K	Univ.	818.70	1,628.00
City for Conquest		12/20–21	11/28–30	K	War.	415.08	858.00
No Time for Comedy		12/18–19	12/1–12/3	K	War.	214.11	1,007.00
SCHEDULE XI (26)							
Quarterback	*1940*	12/13–14	12/4–5/40	K	Par.	436.75	315.00
Rangers of Fortune		12/27–28	12/6–9	K	Par.	673.03	718.00
Escape		12/22–24	12/8–10	K	M. G. M.	666.58	1,179.00
Outsider			12/11–12		All		327.00
Capt. Caution		1/29–30	12/13–14	K	U. A.	355.33	666.00
Mark of Zorro		12/25–26	12/15–18	K	Fox	751.58	1,384.00
Moon Over Burma		12/27–28	12/19–21	K	Par.	673.03	856.00
Arise My Love	*1941*	1/5–7/41	12/22–24	K	Par.	881.72	635.00
Tin Pan Alley		1/3–4	12/25–28	K	Fox	548.35	1,657.00
You'll Find Out		1/9–11	12/29–31	K	R. K. O.	915.63	1,119.00
SCHEDULE XI (27)							
N. W. Mounted Police	*1941*	1/12–15/41	1/1–4/41	K	Para.	1,625.84	2,245.00
Bittersweet		1/16–18	1/5–7	K	M. G. M.	734.17	997.00
Dr. Christian Meets Woman		1/22	1/8–9	K	R. K. O.	144.30	273.00
Tugboat Annie Sails Again		3/5	1/10–11	K	War.	177.16	770.00
The Letter		1/23–25	1/12–15	K	War.	656.88	1,317.
Go West		1/26–28	1/16–18	K	M.G.M.	1,018.66	1,030.00

SCHEDULE XI (27) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Little Nellie Kelly	2/2-4	1/18-22	K	M.G.M.	1,171.22	1,510.00
Long Voyage Home	3/28-29	1/23-25	K	U. A.	431.92	862.00
Thief of Bagdad	2/13-15	1/26-29	K	U. A.	846.85	1,242.00
Chad Hanna	2/9-11	1/30-2/1	K	Fox	981.13	955.00
Santa Fe Trail	2/20-22	2/2-5	K	War.	508.73	1,540.00
No No Nannette	2/28-3/1	2/6-8	K	R. K. O.	415.02	645.00
Love Thy Neighbor	2/23-25	2/9-12	K	Para.	1,263.61	1,813.00
Victory	2/26-27	2/13-15	K	Para.	291.49	846.00
Comrade X	3/2-4	2/16-19	K	M.G.M.	1,162.25	1,381.00
Here Comes Navy		2/20-22		War.		989.00
Kitty Foyle	3/6-8	2/23-26	K	R. K. O.	1,146.08	1,505.
Flight Command	3/16-18	2/27-3/1	K	M.G.M.	997,43	1,152.00
East of The River	3/21-22	3/2-4	K	War.	436.98	737.00
Keeping Company	3/16-18	3/5-6	K	M.G.M.	997.43	326.00
Invisible Women		3/7-8		Univ.		681.00
Gone With the Wind		3/9-12		M.G.M.		1,700.00
Trail of the Vigilantes		3/13-15		Univ.		776.00
Philadelphia Story	3/30-4/2	3/16-19	K	M.G.M.	1,333.30	1,581.00
Son of Monte Cristo	4/3-5	3/20-22	K	U. A.	697.06	1,054.00
Mr. and Mrs. Smith	4/6-9	3/23-26	K	R.K.O.	899.24	1,460.
So Ends Our Night	4/10-12	3/27-29	K	U. A.	347.83	1,030.
Back Street	4/13-15	3/30-4/2	K	Univ.	650.32	1,071.00
Hudson Bay	4/18-19	4/3-4/5	K	Fox	578.66	1,044.00
Come Live With Me	4/24-26	4/6-4/9	K	M.G.M.	698.86	1,295.00
High Sierras	5/16-17	4/10-4/12	K	War.	539.86	677.00

SCHEDULE XI (28)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Virginia	*1941*	5/27–29	4/13–16/41	K	Para.	778.24	1,781.
Western Union		5/4–6	4/17–19	K	Fox	790.36	1,041.00
Tobacco Road		5/14–15	4/20–23	K	Fox	282.71	1,031.00
Second Chorus		5/8–10	4/24–26	K	Para.	545.73	936.00
Strawberry Blonde		5/11–13	4/27–30	K	War.	1,258.71	1,476.00
Mad Doctor		5/21–22	5/1–3	K	Para.	357.13	716.00
Buck Private		5/18–20	5/4–7	K	Univ.	1,585.75	1,572.00
Topper Returns		5/23–24	5/8–10	K	U. A.	602.08	980.00
Lady Eve		5/25–27	5/11–14	K	Para.	759.07	1,158.
Badman		5/30–31	5/15–17	K	M.G.M.	864.15	1,034.00
Great Dictator		6/4–7	5/18–21	K	U. A.	1,056.97	1,556.00
Nice Girl		6/12–14	5/22–24	K	Univ.	870.94	917.00
A. Hardy's Private Secretary		6/8–10	5/25–29	K	M.G.M.	1,105.84	1,605.00
Penalty		6/11	5/30–31	K	M.G.M.	106.40	930.00
That Night in Rio		6/12–14	6/1–4	K	Fox	870.94	1,082.00
Devil and Miss Jones		6/19–21	6/5–7	K	R.K.O.	424.89	797.00
Road to Zanzibar		6/22–24	6/8–11	K	Para.	929.81	1,623.00
Great American Broadcast		6/27–28	6/12–14	K	Fox	495.24	811.00
Men of Boystown		6/29–7/1	6/15–18	K	M.G.M.	788.42	1,302.00
Woman's Face		7/9–10	6/19–21	K	M.G.M.	515.65	740.00
Ziegfield Girl		7/6–8	6/22–24	K	M.G.M.	1,062.40	994.00
Strange Alibi		7/6–8	6/25–26	K	War.	1,062.40	173.00
People vs. Dr. Kildare		7/2–3	6/27–28	K	M.G.M.	304.48	406.00
Meet John Doe		7/18–19	6/29–7/2	K	War.	599.00	1,049.00
Pot of Gold		7/13–15	7/3–5	K	U. A.	871.57	852.00

SCHEDULE XI (28) (*Continued*)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
That Hamilton Woman		7/20–22	7/6–9	K	U. A.	666.49	1,030.00
Devilboys of Air			7/10–12		War.		816.00
Love Crazy		7/28–29	7/13–16	K	M.G.M.	685.14	1,420.00
I Wanted Wings		8/3–5	7/20–23	K	Para.	832.39	1,259.00
Big Store		8/1–2	7/17–19	K	M.G.M.	509.39	1,084.00
SCHEDULE XI (29)							
One Night in Lisbon	*1941*	8/8–9/41	7/24–26	K	Para.	448.58	1,022.00
In The Navy		8/10–13	7/27–30	K	Univ.	1,609.93	1,369.00
Man Hunt		8/6–7	7/31–8/2	K	Fox	492.96	1,025.00
Billy The Kid		8/17–18	8/3–5	K	M.G.M.	1,114.96	1,155.00
Underground		8/22/23	8/6–7	K	War.	595.58	536.00
Out of Fog		8/29–30	8/8–9	K	War.	433.49	600.00
Blood and Sand		8/24–26	8/10–12	K	Fox	1,161.59	24.00
That Uncertain Feeling		8/27–28	8/13–14	K	U. A.	393.59	531.00
Reluctant Dragon			8/15–16		R.K.O.		720.00
They Met in Bombay		9/4–6	8/17–20	K	M.G.M.	869.15	1,669.00
Barnacle Bill		9/7–9	8/21–23	K	M.G.M.	1,179.16	1,092.00
Kiss the Boys Goodbye		9/12–13	8/24–27	K	Para.	564.37	1,358.00
Blossoms in Dust		9/26–27	8/28–30	K	M.G.M.	733.08	960.00
Caught in Draft		9/14–17	8/31–9/3	K	Para.	1,559.57	1,965.00
Lady from Cheyenne		9/21–23	9/4–6	K	Univ.	1,239.18	818.00
Moon Over Miami		9/21–23	9/7–10	K	Fox	1,239.18	1,401.00
Shepherd of Hills		10/3–4	9/11–13	K	Para.	695.44	1,040.00
Charlie's Aunt		9/28–30	9/14–17	K	Fox	1,168.45	1,553.00

SCHEDULE XI (29) *(Continued)*

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Ringside Maisie	10/1–2	9/18–20	K	M.G.M.	443.43	656.00
Tom, Dick and Harry	10/5–6	9/21–24	K	R.K.O.	743.30	1,165.00
My Life With Caroline	10/7–8	9/25–27	K	R.K.O.	440.71	833.00
Hold That Ghost	10/12–14	9/28–10/1	K	Univ.	1,462.75	136.00
Wild Geese Calling	10/17–18	10/2–4	K	Fox	524.90	881.00
Life Begins for Andy Hardy	10/19–21	10/5–8	K	M.G.M.	1,439.30	1,777.00
Bad Men of Missouri	10/24–25	10/9–11	K	War.	624.18	906.00
Aloma of South Seas	10/26–28	10/12–15	K	Para.	1,268.95	1,732.00
Dr. Kildaire's Wedding Day	10/29–30	10/16–18	K	M.G.M.	404.74	912.00
Dr. Jekyll and Mr. Hyde	11/2–3	10/19–22	K	M.G.M.	936.58	1,333.00
Whistling in the Dark	11/5–8	10/23–25	K	M.G.M.	1,008.18	907.00
Robin Hood (Spec. Mat.)		10/24		War.		169.00

SCHEDULE XI (30)

Sun Valley Serenade	*1941*	11/9–11	10/26–29/41	K	Fox	1,683.42	1,713.00
Navy Blues		11/13–15	10/30–11/1	K	War.	956.05	1,062.00
Dive Bomber		11/16–18	11/2–5	K	War.	1,082.77	1,881.00
Unfinished Business			11/6–8		Univ.		1,071.00
Hold Back Dawn		11/20–22	11/9–12	K	Para.	1,294.38	1,388.00
Lady Be Good		11/27–29	11/13–15	K	M.G.M.	925.02	1,120.00
Wizard of Oz (Spec. Mat.)			11/11		M.G.M.		165.00
Yank In R. A. F.		11/23–26	11/16–19	K	Fox	1,909.45	1,896.00
When Ladies Meet		12/3–4	11/20–22	K	M.G.M.	462.09	1,420.00
Nothing But the Truth		12/7–10	11/23–26	K	Para.	1,241.15	1,678.00
Belle Starr		12/14–16	11/27–29	K	Fox	1,221.28	1,173.00

SCHEDULE XI (30) (*Continued*)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Little Foxes		12/11–13	11/30–12/3	K	R.K.O.	422.78	1,193.00
Smilin' Thru		12/19–20	12/4–6	K	M.G.M.	361.36	849.00
Honky Tonk		12/24–27	12/7–10	K	M.G.M.	1,141.32	1,639.00
All That Money Can Buy		12/21–23	12/11–13	K	R.K.O.	743.95	769.00
Weekend in Havana		12/28–31	12/18–17	K	Fox	1,383.47	1,282.00
Lydia	*1942*	1/7–8	12/18–20	K	U. A.	259.25	608.00
It Started With Eve		1/4–6	12/21–24	K	Univ.	945.18	730.00
Shadow of Thin Man		1/1–3	12/25–27	K	M.G.M.	1,145.46	1,180.00
Feminine Touch		1/9–10	12/28–30	K	M.G.M.	581.83	1,163.00
(Spec. Mat.)Northwest Passage		5/1–4/40*	12/30	K 4/21–24/40*	M.G.M.	1,561.25	68.00
Birth of Blues		1/11–14	12/31–1/3	K	Para.	1,354.33	1,855.00
SCHEDULE XI (31)							
Look Who's Laughing	*1942*	1/18–20/42	1/4–7/42	K	R.K.O.	1,194.77	1,254.00
International Squadron			1/8–10		War.		973.00
I Woke Up Dreaming		1/27–29	1/11–14	K	Fox	783.85	1,663.00
Skylark		1/30–31	1/15–17	K	Para.	740.92	1,231.00
H. M. Pulham, Esq.		1/25–26	1/18–21	K	M.G.M.	1,047.40	1,918.00
Sundown		2/1–2	1/22–24	K	U. A.	1,091.39	1,210.00
Keep Em Flying		2/8–10	1/25–28	K	Univ.	1,527.69	1,795.00
Swamp Water		2/3–4	1/29–31	K	Fox	526.53	1,077.00
Louisiana Purchase		2/15–17	2/1–4	K	Para.	1,186.70	1,739.00
Appointment for Love		2/20–21	2/5–7	K	Univ.	384.04	744.00
Corsican Brothers		2/22–24	2/8–11	K	U. A.	1,081.61	1,553.00
Chocolate Soldier		2/25–26	2/12–14	K	M.G.M.	341.52	998.00

SCHEDULE XI (31) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
They Died With Boots On	3/1–3	2/15–18	K	War.	1,150.62	1,711.00
Playmates	2/27–28	2/19–21	K	R.K.O.	549.05	901.00
Babes on Broadway	3/8–10	2/22–25	K	M.G.M.	1,161.88	1,880.00
Tarzan's Secret Treasure	3/20–21	2/26–28	K	M.G.M.	610.33	1,037.00
Johnny Eager	3/15–17	3/1–4	K	M.G.M.	1,304.75	1,398.00
Suspicion	3/26–28	3/5–7	K	R.K.O.	908.39	1,168.00
How Green Was My Valley	3/22–25	3/8–11	K	Fox	1,554.57	1,925.00
You're In the Army Now	3/18–19	3/12–14	K	War.	359.28	776.00
Ball of Fire	3/29–4/1	3/15–18	K	R.K.O.	1,279.27	1,665.00
Hellzapopin	4/10–11	3/18–21	K	Univ.	652.27	1,075.00
Soul of Fury	4/5–7	3/22–25	K	Fox	1,253.63	1,783.00
Two Faced Women	4/8–9	3/26–28	K	Fox	538.46	957.00
Secrets of Wasteland		3/28 (Mat. only)		Para.		116.00
Bahama Passage	4/12–14	3/29–4/1	K	Para.	1,323.47	1,824.00
Paris Calling	4/17–18	4/2–4/4	K	Univ.	605.47	722.00
Bugle Sounds	4/19–21	4/5–8	K	M.G.M.	1,343.34	1,940.00
All Through the Night	4/24–25	4/9–11	K	War.	518.61	1,116.00
Women of the Year	4/26–29	4/12–15	K	M.G.M.	948.98	1,710.00
SCHEDULE XI (32)						
Wolfman *1942*	4/22–23	4/16–18	K	Univ.	413.86	876.00
To Be Or Not To Be	5/8–9	4/19–22	K	U. A.	587.04	1,734.00
Remember the Day	5/6–7	4/23–25	K	Fox	454.57	1,028.00
Captain Clouds	5/10–12	4/26–29	K	War.	1,170.98	1,663.00
Shanghai Gesture	5/15–16	4/30–5/2	K	U. A.	641.29	976.00

SCHEDULE XI (32) (*Continued*)

Name of Picture	Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
We Were Dancing	5/20–21	5/3–6	K	M.G.M.	367.10	1,441.00
Sullivan's Travels	5/22–23	5/7–9	K	Para.	551.79	998.00
Song of the Islands	5/24–27	5/10–13	K	Fox	1,569.27	1,469.00
Lady Has Plans	5/28–30	5/14–16	K	Para.	542.12	1,103.00
Fleets In	5/31–6/2	5/17–20	K	Para.	1,413.81	1,681.00
Roxie Hart	6/3–4	5/21–23	K	Fox	444.01	1,135.00
Ride Em Cowboy	6/7–9	5/24–26	K	Univ.	1,085.33	1,242.00
Vanishing Virginian	6/10–11	5/27–28	K	M.G.M.	309.67	475.00
Dumbo	6/21–13	5/29–30	K	R.K.O.	413.54	691.00
Kings's Row	6/14–16	5/31–6/2	K	War.	1,462.52	1,545.00
Nazis Agent	6/12–18	6/3–4	K	M.G.M.	549.84	405.00
Spoilers	6/19–20	6/5–6	K	Univ.	483.39	671.00
Shores of Tripoli	6/21–24	6/7–10	K	Fox	1,845.72	1,820.00
Male Animal	6/25–27	6/11–13	K	War.	732.35	876.00
Courtship of A. Hardy	6/28–30	6/14–17	K	M.G.M.	887.63	1,825.00
Jungle Book	7/3–4	6/18–20	K	Univ.	602.25	1,033.00
My Favorite Blonde	7/5–7	6/21–24	K	Para.	1,030.27	1,615.00
Twin Beds	7/10–11	6/25–27	K	U. A.	582.33	964.00
Rio Rita	7/12–14	6/28–7/1	K	M.G.M.	1,149.55	1,497.00
Saboteur	7/17–18	7/2–4	K	Univ.	621.62	945.00
In This, Our Life	7/19–21	7/5–8	K	War.	997.22	1,701.00
Moontide	7/15–16	7/9–11	K	Fox	475.46	949.00
Reap the Wild Wind		7/12–15		Para.		2,549.00
I Married An Angel	7/24–25	7/16–18	K	M.G.M.	476.36	836.00
My Gal Sal	7/26–28	7/18–22	K	Fox	1,169.54	1,762.00
Gold Rush	8/5–6	7/23–25	K	U. A.	475.10	805.00

SCHEDULE XI (33)

Name of Picture		Bailey Play Date	Ken Play Date	Where Played First	Distributor	Bailey Gross	Ken Gross
Tortilla Flat	*1942*	8/7–8/42	7/26–29/42	K	M.G.M.	738.07	1,736.00
10 Gent. From West Point		8/13–15	7/30–8/1	K	Fox	580.69	1,098.00

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FILED

NOV 24 1951

CHARLES ELMORE CROPLEY

In the

Supreme Court of the United States

October Term, 1951

No. 392

DIPSON THEATRES, INC.,

Petitioner,

against

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. McFAUL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Sidney B. Pfeifer,
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Attorneys for the Respondents.

November 26, 1951.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

DIPSON THEATRES, INC., *Petitioner,* *against* BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. MCFAUL, *Respondents.*	No. 392

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported in 190 F. (2d) 951. The opinion of the District Court is reported in 86 F. Supp. 716.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

The only question presented by this petition is whether the trial court erred in entering its findings of fact and conclusions of law,[1] unanimously affirmed by the Court of Appeals, that there was not a conspiracy among the defendants to injure the plaintiff in its property or business.

STATUTES INVOLVED

The statutes involved are the Act of July 2, 1890, 26 Stat. 209, and the Act of October 15, 1914, 38 Stat. 730, commonly referred to as the Sherman and Clayton Acts.

STATEMENT

Petitioner seeks this writ, asserting, in effect, that the Court of Appeals has decided "a federal question probably in conflict with applicable decisions of this Court". The petition is based on the theory that the Court of Appeals has misinterpreted and misapplied the decision of this Court in *United States* v. *Paramount Pictures,* 334 U. S. 131. That theory is made possible only by petitioner's complete distortion of the decision of the Court of Appeals.

The complaint herein was filed on September 17, 1946, against eight distributors and three exhibitors of motion pictures. The complaint alleged violations of the anti-trust laws as to four theatre situations in metropolitan Buffalo, New York. An amended complaint was filed which alleged in broad and inclusive terms the existence of an over-all conspiracy in greater

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[1]The opinion of the Court of Appeals and the Findings of Fact and Conclusions of Law of the District Court are printed and bound separately as Appendix A to this brief.

Buffalo in which all eleven defendants participated. On the trial, there was no abatement in the vehemence of plaintiff's claims or in its efforts to prove the existence of a general conspiracy affecting all four of its theatres.

The case proceeded to trial on the theory that plaintiff's four theatres—the Century and Bailey, located in Buffalo, the Ridge, located in Lackawanna, and the Riviera, located in North Tonawanda—had been damaged because of the illegal acts of the eleven named defendants. At the close of the plaintiff's case, the District Court dismissed the cause of action as to Lackawanna against all defendants, and the entire complaint against Columbia Pictures Corporation. Those dismissals have never been alleged as error. The court then proceeded to take the evidence of the remaining defendants. In its final decision the District Court dismissed the action against all defendants as to North Tonawanda and the entire complaint against Universal Film Exchanges, Inc. No error has ever been alleged as to those dismissals. Finally, in its decision, the District Court dismissed the case against all the defendants as to the Century and the Bailey. In the Court of Appeals, appellant abandoned its original claim for loss of profits of a million and a half dollars at the Century and claimed damages for a period of seven months only—from November, 1940, to June, 1941. It has now abandoned that claim, saying "the claim as to the Century is relatively unimportant because it was operated by petitioner only from November 20, 1940 to June 29, 1941, when the lease was surrendered" (Petition, page 4). Petitioner is here only so far as its claim for the Bailey theatre is concerned.

Petitioner's statement of the case is inaccurate in many respects. The facts are fully and accurately stated in the opinion of the Court of Appeals. A summary of those facts shows that Michael Shea was one of the first—if not the first—motion pic-

ture theatre operators in Buffalo. As the demand for theatres increased in Buffalo, Michael Shea in 1925 sold a part interest in his theatre chain to Paramount to obtain financing to build the first-run Buffalo theatre, still the largest in the area. In 1926 Michael Shea acquired the lease of the Kensington theatre and in 1928 the lease of the Bailey theatre. Loew's, operator of the first-run Century theatre, in 1928 turned that theatre over to Michael Shea in return for a part interest in the business. Michael Shea died in 1934 and the defendant McFaul, his successor, Paramount and Loew's, organized the defendant Buffalo Theatres, Inc. (referred to throughout as "Shea") to continue the business.

In 1939 Nikitas Dipson, who controlled or was associated with a large theatre chain, began operations in Buffalo. In that year Shea declined an opportunity to renew its lease on the Century and Bailey. Dipson then acquired both theatres, the first by lease and the latter by purchase of the fee. Of the 67 theatres in Buffalo in 1940, Shea and Dipson each operated 11.

In the admitted absence of direct evidence of the alleged conspiracy, petitioner attempted to prove its existence by circumstantial evidence built around its experiences with the Bailey and Century after it or its predecessors acquired them from Shea. The Bailey had never been a wholly second-run theatre when operated by Shea. The Kensington was originally the only second-run theatre in the neighborhood, but when the Bailey came under the same management as the Kensington, approximately half of the pictures were exhibited in the Bailey on second run. From 1936 on, however, Shea had gradually increased the percentage of second-run pictures at the Kensington. The Bailey became more and more a third-run theatre. It was undisputed that both theatres could not

run day and date and that one had to be preferred over the other.

When Shea surrendered the Bailey lease in 1939, each distributor found itself faced with the necessity of deciding which theatre would receive the prior run of its pictures. Petitioner demanded second run from all the distributors with a seven to twenty-one day clearance over the Kensington. Shea also contended that it was entitled to second run at the Kensington with a twenty-one day clearance over the Bailey. Neither received the treatment it desired from any distributor. Each distributor established its own individual policy with each theatre. Loew's and Paramount licensed the second run to the Kensington with a seven-day clearance over the Bailey. Twentieth Century-Fox licensed the Kensington second run with no clearance. RKO licensed the Kensington second run with seven days clearance. Warner [2] split its product equally between the two theatres on second run. United Artists generally licensed the Kensington second run with a one-day clearance. Universal offered all its product second run to the Bailey with clearance over the Kensington, but petitioner refused to license Universal's product. Columbia licensed all its product second run to the Bailey with clearance over the Kensington.

Petitioner claims that the Bailey theatre after its acquisition by petitioner was demoted from second run to third run as a result of the conspiracy among the defendants and that, as a result, petitioner sustained damages. In the Court of Appeals, however, petitioner conceded that "from January 1, 1936 to August 1, 1939, when Shea operated the Bailey, it played 304 of these films ahead of the Kensington

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[2] Warner Bros. Pictures Distributing Corporation, formerly known and sued as Vitagraph, Inc.

and 225 of them after the Kensington" (page 25, Appellant's brief in the Court of Appeals). From petitioner's own admission, therefore, it is apparent that Shea operated the Bailey as both a second and third run theatre. When petitioner assumed operation of the Bailey it also operated the theatre on second and third run during the entire period of its claim for damages.

The Court of Appeals carefully reviewed all the facts relating to the Bailey, as follows (190 F. (2d) 951, 956):

> "However, the inference of conspiracy might have been sustained if Dipson could have shown that the Bailey was, from the distributor's point of view, clearly a better customer, i.e., capable of producing more revenue, than the Kensington. This he failed to do. There was considerable conflict in the evidence as to which was the better appointed theatre. But, it was uncontroverted that the Kensington was in a growing, the Bailey in a declining, neighborhood. There was also dispute as to which theatre would ordinarily out-gross the other. There, however, is uncontroverted evidence that on the only occasion when the same show ('Pinocchio') played both theatres on the same day, the Kensington out-grossed the Bailey. Warner, which split its product between the Bailey and the Kensington in the years 1939-1943 inclusive received almost twice as much rental from the Kensington as from the Bailey. There was also evidence showing that on the average the Bailey grossed more playing after the Kensington than it did playing comparable pictures second run. This is concededly unusual and was ascribed, apparently with good reason, to Shea's prior advertising which had benefited Dipson in view of the latter's policy not to advertise the Bailey pictures. There was also convincing evidence that the Bailey's gross was being very adversely affected by the activities of the management of the Genesee theatre. The Genesee was much closer to

the Bailey than the Kensington, was of comparable quality, and charged lower admissions. One Basil, who managed and had a half interest in the Bailey, owned the Genesee and in order to favor his wholly owned theatre had violated the agreed clearance and run between it and the Bailey, there being 93 instances of this practice in the year 1940 alone.

"In the light of the foregoing a conspiracy was not established because some of the distributors, when forced to choose between the Bailey and the Kensington, decided that they would gross more at once and in the long run by showing all their pictures at the Kensington first, thus continuing the established trend toward that theatre. In addition, various of the distributor defendants had additional reasons for their choice. Thus Loew, in addition to having an interest in the Kensington, had had unfortunate financial dealings with Dipson in the past. RKO and Fox had had similar experiences, and Warner's experience with Dipson at the Century was not satisfactory. The fact that Dipson, although an experienced exhibitor, was also far more of a dealer in theatres than Shea, was a further factor in the decisions of some distributors to prefer the Kensington."

To simplify the case, the Court of Appeals divided the defendants into four groups: one, the distributors RKO, United Artists and Warner, which neither owned theatres in Buffalo nor had franchise agreements with Shea; two, Twentieth Century-Fox, which had a first and second run franchise agreement with Shea; three, Loew's and Paramount, which, together with the defendant McFaul, owned the stock of Shea and up to 1944 had a first-run franchise agreement with it; and four, Shea and McFaul, the exhibitor defendants.

Concerning the first group, the Court of Appeals said (190 F. (2d) 951, 959):

> "We agree with the trial judge that the first group of defendants—RKO, United and Warner—have not been shown to have been parties to a conspiracy. The mere tabulation of their diverse actions with respect to Shea and Dipson is alone enough to support the decision below since all direct evidence of a conspiracy is lacking. Dipson's allegations in its brief that the actions of these defendants were only taken after clearance with and on sufferance of Shea are entirely unsupported by the record and even had such conspiracy existed no reason for such sufferance is suggested."

Concerning the activities of Twentieth Century-Fox, the court concluded (190 F. (2d) 951, 959):

> "As we have already indicated, the choice of Fox under such circumstances to license its product to Shea for another three years rather than for just one year did not show that it and the two remaining groups of defendants were conspiring to harm Dipson."

And concerning the activities of Loew's and Paramount, the court concluded (190 F. (2d) 951, 960):

> "Had a monopoly been obtained by Shea we might have viewed the question differently but Shea did not have a monopoly of first and second run theatres in Buffalo and Loew and Paramount did not have a monopoly of available films. Shea did not use first run buying power to get second run preference, or vice versa, nor indeed has any such abuse been claimed. Nor did it attempt to exclude Dipson by contracting for more films than it could use. Dipson could and did obtain sufficient films to exhibit at the Century and Bailey (although it did not obtain all it desired). Had a monopoly been the aim of Loew and Paramount, they

> would have caused Shea to retain control of the Century and Bailey. We hold that their activities did not show a joint action that should upset the finding that no conspiracy existed between them."

Concerning the petitioner's own demands, the court said (190 F. (2d) 951, 960):

> "As we have said, had Dipson's demands been acceded to by the distributors it would have secured a monopoly with far less reason to support it than Shea has ever had. There is evidence that Dipson wanted all or nothing from each distributor and testimony from its own witness that its aim was a monopoly."

The foregoing summary can only point up a few of the inaccuracies in petitioner's statement of the facts. Respondents, therefore, adopt by reference the statement of the facts as made by Judge Augustus N. Hand in the unanimous opinion of the Court of Appeals.

ARGUMENT

FIRST: THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION OF THIS COURT IN *UNITED STATES* v. *PARAMOUNT PICTURES*, 334 U. S. 131.

Petitioner's assertion that "unless the decision below is reviewed and reversed this Court's decisions in the *Paramount, Emich* and *Bigelow* cases will have no binding effect in the Second Circuit" (Petition, page 25) is without foundation in law or in fact. There is nothing in the decision of the Court of Appeals for the Second Circuit which in any way

conflicts with any decision of this Court. The opinion of Judge Augustus N. Hand, speaking for the unanimous court, shows that that court gave the fullest consideration to the decision of this Court in the *Paramount* case. Judge Hand said (190 F. (2d) 951, 958):

> "Also the expediting court in the Paramount case specifically held, contrary to Dipson's position, that 'The decision of such controversies as may arise over clearances should be left to local suits in the area concerned'. U. S. v. Paramount Pictures, D. C., 66 F. Supp. 323, 342. The fact that plaintiff now concedes that Columbia and Universal were not parties to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here. There is also no showing that evidence of the Buffalo situation was introduced or relied upon by the government in proving the conspiracy in the Paramount case. Therefore we must look to the record in this case to see if Dipson has shown that the general conspiracy found to exist in the Paramount case, or some other conspiracy, had as one of its objects or effects the monopolization of the first and second run exhibition of pictures in the Buffalo area and that he suffered injury as a result. Of course, the activities revealed in the Paramount case lead us to scrutinize with great care the activities of the same defendants here for where one has violated the Sherman Act in one situation, it might be expected that the same parties would be willing and able to do so elsewhere."

In its petition and on its appeal below, petitioner has assumed that the decision of this Court in the *Paramount* case conclusively settled the question that a local conspiracy existed among the defendants in this case and that citation of that

authority alone justified a reversal by the appellate court below. Stated differently, petitioner claims that the failure of the District Court and the failure of the Court of Appeals to find a conspiracy solely on the strength of the *Paramount* case is reversible error. That is the only reason advanced for the issuance of this writ. Both this Court and the Court of Appeals for the Second Circuit have already passed upon that question adversely to petitioner's position. In *Fifth and Walnut* v. *Loew's Incorporated*, 176 F. (2d) 587 (C. A. 2nd, 1949), *cert. den.* 338 U. S. 894, *rehearing den.* 338 U. S. 940, the court said (p. 590):

> "It is of the essence of plaintiffs' argument that 'but for the fact that a Jury had to pass upon the question of damages,' a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the court. It was not the move-over arrangement itself that was condemned in United States v. Paramount Pictures, Inc., 334 U. S. 131, 159, 160, 68 S. Ct. 915, 92 L. Ed. 1260, but rather the discriminatory fashion in which move-over privileges were accorded by distributors to 'large affiliated and unaffiliated circuits' and not to 'small independent exhibitors.' Plaintiffs make no claim here that they were denied the opportunity to move what first-run pictures they did receive over to the Brown.
>
> "Likewise, the joint operation of the Brown Theatre by one independent exhibitor and a subsidiary of one of the defendants (Loew's) was a type of activity which would not be unlawful unless a conspiracy to monopolize or restrain commerce by means of that

> activity was found by the jury to exist as to some of the defendants in the present action. The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made."

The fallacy of petitioner's position is apparent from its own treatment of the four situations of which it originally complained and concerning which the case was tried. The *Paramount* case, it now contends, required a reversal below as to the Bailey and is the only ground now urged for issuance of the writ. Petitioner did not appeal from the dismissals of Columbia and Universal or appeal from the dismissal as to the Ridge and Riviera theatres or even attempt to maintain its position with respect to the Century. And yet, so far as the *Paramount* case is concerned, all four of petitioner's theatres are in identical positions.

Petitioner's assertion that "the final decision in the *Paramount* case was not rendered until after petitioner's case was tried" (Petition, page 15) is a blind adherence to dates and a play on words. This is demonstrated by petitioner's own chronology (Petition, p. ii). The trial below was begun on September 14, 1948, over five months after the decision of this Court

in the *Paramount* case. The opinion of the trial court was handed down on September 26, 1949, two months after the final decision of the Expediting Court in the *Paramount* case. The Findings of Fact and Conclusions of Law were entered on August 1, 1950, nearly two months after the final affirmance by this Court of the decrees in the *Paramount* case. Petitioner had the full benefit of all the opinions and decisions entered in the *Paramount* case.

SECOND: SINCE THERE WAS NO CONSPIRACY TO INJURE PETITIONER IN ITS PROPERTY OR BUSINESS, THE QUESTION OF DAMAGES CAN NOT ARISE.

Petitioner's misconception of the *Paramount* case is compounded by its complete misunderstanding of *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251. The *Bigelow* case was expressly founded upon a finding by the jury that the defendants had combined and conspired "to maintain a discriminatory system of distribution" (327 U. S. 251, 254). The defendants, though not admitting the conspiracy, did not challenge that finding in this Court. The sole question before this Court in that case was "whether the evidence of damage is sufficient to support the verdict" (p. 254). There was no consideration of conspiracy. If the finding of conspiracy had not been made by the jury there could have been no consideration of the question of damages by this Court in the *Bigelow* case. The *Bigelow* case thus has no conceivable relevance to this petition, since the decision of both courts in this case was expressly based upon a finding that there was no conspiracy among the respondents.

Petitioner is clearly wrong in asserting that "the District Court dismissed an anti-trust suit brought by petitioner upon the ground that the respondents' conduct had not damaged the

petitioner" (Petition, page 2). Petitioner is correct, however, in saying that "the Circuit Court affirmed the dismissal on the ground that the respondents' conduct did not violate the anti-trust laws" (Petition, p. 2). Both decisions below were based upon a clear understanding and a proper application of the anti-trust laws.

The District Court found as a matter of law and as a matter of fact that the respondents acted independently and without concert of action or conspiracy in their dealings with the petitioner's four theatres and with the Shea theatres. The distribution policies of the respondents in Buffalo, Lackawanna and Tonawanda show a complete absence of uniformity of action among them. A schedule of those activities was prepared by the court below and is contained in its opinion at 190 F. (2d) 951, 955, and at page 2088 of the record filed in conjunction with this petition. A correct copy of that schedule is also contained in Appendix A to this brief.[3] It conclusively demonstrates the absence of a conspiracy among the respondents.

Moreover, the District Court entered detailed findings of fact and conclusions of law in which all the evidence was meticulously considered and the law properly applied. Those findings are conclusive upon the question of conspiracy. Findings 58 and 59 read, as follows (Appendix A, pp. 37-38):

---

[3] The respondents have felt compelled to reprint the opinion of the Court of Appeals because of an error, which is assumed to be typographical, in the reprint of the opinion sent up with the petition. Under the heading Lackawanna in petitioner's reprint of the opinion it appears that the respondent Twentieth Century-Fox Film Corporation licensed petitioner second run in Lackawanna whereas the true fact as shown in the official opinion of the court and as shown in the record is that Twentieth Century-Fox licensed petitioner first run in Lackawanna.

"FIFTY-EIGHTH: In licensing its motion pictures for subsequent run exhibition in Buffalo in the Kensington-Bailey area, each of the defendant distributors acted independently, without consultation or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its officers or representatives respecting the theatre or theatres from which it would derive the greatest amount of film license revenue from subsequent run exhibition of its pictures in Buffalo.

"FIFTY-NINTH: The defendant distributors or any two or more of them did not at any time conspire or combine to harm, oppress or deprive the Bailey Theatre or the plaintiff of motion pictures or any particular run of motion pictures, nor did they monopolize or attempt to monopolize the subsequent run exhibition of motion pictures in the Kensington-Bailey area."

Similar findings as to the respondents' conduct with respect to the Century and Lackawanna were made. See Findings 41, 42, 67 and 68. Conclusions of law 2 and 3 read as follows (Appendix A, p. 42):

"2. Plaintiff has failed to establish any violation by the defendants of the Sherman or Clayton Acts as alleged in the amended complaint.

"3. The plaintiff has not been damaged in its business or property by any act or conduct of the defendants."

The findings of the District Court are, unless clearly erroneous, binding upon the appellate courts. Such is the holding of this Court in *United States* v. *Yellow Cab Co.*, 338 U. S. 338. In that case, this Court said (pp. 340-41):

petitioner" (Petition, page 2). Petitioner is correct, however, in saying that "the Circuit Court affirmed the dismissal on the ground that the respondents' conduct did not violate the anti-trust laws" (Petition, p. 2). Both decisions below were based upon a clear understanding and a proper application of the anti-trust laws.

The District Court found as a matter of law and as a matter of fact that the respondents acted independently and without concert of action or conspiracy in their dealings with the petitioner's four theatres and with the Shea theatres. The distribution policies of the respondents in Buffalo, Lackawanna and Tonawanda show a complete absence of uniformity of action among them. A schedule of those activities was prepared by the court below and is contained in its opinion at 190 F. (2d) 951, 955, and at page 2088 of the record filed in conjunction with this petition. A correct copy of that schedule is also contained in Appendix A to this brief.[3] It conclusively demonstrates the absence of a conspiracy among the respondents.

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The findings of the District Court are, unless clearly erroneous, binding upon the appellate courts. Such is the holding of this Court in *United States* v. *Yellow Cab Co.*, 338 U. S. 338. In that case, this Court said (pp. 340-41):

> "The Government suggests that the opinion of the trial court 'seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the court.' We see that it did indeed accept defendants' evidence and sustained defendants' view of the facts. But we are unable to discover the slightest justification for the accusation that it did so 'uncritically.' Also, it rejected the inferences the Government drew from its documents, but we find no justification for the statement that it 'ignored' them. The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

The situation before this Court in the *Yellow Cab* case, so far as the findings of the District Court are concerned, is identical with that now before the Court on this petition. Petitioner would have this Court refute the findings of the District Court, try the case *de novo,* and find the facts as petitioner desires them. The findings and conclusions of the District Court, however, are not only amply supported by the record, but are the only credible findings and conclusions that could have been made.

CONCLUSION

A writ of certiorari should not issue to the Court of Appeals for the Second Circuit.

Petitioner has advanced no valid reason why a writ of certiorari should issue to the Court of Appeals for the Second Circuit. In affirming by unanimous decision the judgment below, the Court of Appeals concluded (pp. 960-1):

> "In summary, the plaintiff only alleges a conspiracy with respect to runs and the conduct of the distributor defendants fails to indicate that any such conspiracy existed. Except for Loew and Paramount, all the distributor defendants gave plaintiff the run it desired in some of its theatres where it competed with Shea. Loew and Paramount could legally favor their own theatres and plaintiff was able to obtain sufficient pictures for its theatres.
>
> "In view of the foregoing we find that Judge Knight's conclusion as to the lack of any conspiracy affecting the Bailey and Century was supported by the evidence and must be sustained. As we affirm the decision below on the ground that no illegal conspiracy is shown, it is unnecessary to discuss so much of that opinion as held that conspiracy or not, plaintiff had suffered no damages. Suffice it to say that it appears from the record that there were many reasons given by the appellees which would explain Dipson's lack of financial success even in the absence of conspiracy and would negative any inference of conspiracy that might arise from the existence of unexplained damages or losses. The losses at the Century seem to have been the result of bad management, and at the Bailey seem in a large part due to bad management, unfair competition by the Genesee and a general decline in the neighborhood."

There is nothing in the decision of the Court of Appeals for the Second Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. There is no question of law raised by the petitioner which has not been, but should be, settled by this Court.

Respectfully submitted,

FRANK G. RAICHLE,
EDWARD C. RAFTERY,
SIDNEY B. PFEIFER,
JOHN F. CASKEY,
Attorneys for the Respondents.

November 26, 1951.

NOV

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 392

DIPSON THEATRES, INC.,

Petitioner,

against

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION AND VINCENT R. McFAUL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX A TO RESPONDENTS' BRIEF

November 26, 1951.

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 247—October Term, 1950.

(Argued May 9, 1951 Decided July 25, 1951.)

Docket No. 21887

DIPSON THEATRES, INC.,

Plaintiff-Appellant,

—against—

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, *VITAGRAPH, INC., LOEW'S, INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. McFAUL, *WARNER BROS. PICTURES DISTRIBUTING CORP. (formerly Vitagraph, Inc.)

Defendants-Respondents.

Before:

SWAN, AUGUSTUS N. HAND and CLARK,

Circuit Judges.

Appeal from the United States District Court for the Western District of New York.

In an action for treble damages to plaintiff's motion picture exhibition business arising out of an alleged conspiracy among eight motion picture distributors, two corporate exhibitors and the latter's president, to monopolize

the exhibition of first and second run motion pictures in the Buffalo area in violation of the anti-trust laws, plaintiff appeals from so much of the judgment as dismissed the action against six of the distributor defendants and the exhibitor defendants. Affirmed.

BORINS & HOFFMAN, *Attorneys for Appellant;* Robert L. Wright, Louis Borins and Dwight Campbell, Jr., Counsel.

RAICHLE, TUCKER & MOORE, *Attorneys for Appellees Buffalo Theatres, Inc., Loew's Inc. and Paramount Pictures, Inc.;* Frank G. Raichle, C. Stanley Thompson, Louis Phillips and James O. Moore, Jr., Counsel.

SIDNEY B. PFEIFER, *Attorney for Defendants-Appellees RKO Radio Pictures, Inc., and Twentieth Century-Fox Film Corporation;* John F. Caskey and Harry M. Pimstein, Counsel.

O'BRIEN, DRISCOLL, RAFTERY & LAWLER, *Attorneys for Appellee, United Artists Corporation;* Edward C. Raftery and George A. Raftery, Counsel.

O'BRIEN, DRISCOLL, RAFTERY & LAWLER, *Attorneys for Appellee Warner Bros. Pictures Distributing Corporation, formerly called Vitagraph, Inc.;* Edward C. Raftery, George A. Raftery, Robert W. Perkins and Morris Ruffman, Counsel.

BROWN, KELLY, TURNER & SYMONS, *Attorneys for Appellee Vincent R. McFaul;* J. Edmund Kelly and John E. Leach, Counsel.

AUGUSTUS N. HAND, *Circuit Judge:*

This action was originally instituted in 1946 by Dipson Theatres, Inc. (hereinafter called Dipson), against eight national film distributors,[1] hereinafter called Warner, Loew, Paramount, RKO, Fox, Universal, Columbia, and United; Buffalo Theatres, Inc. (hereinafter called Shea), its subsequently dissolved subsidiary Bison Theatres Corporation, and its president, McFaul, for treble damages arising from a violation of the Sherman Anti-Trust Act, 15 U. S. C. § 1 ff. The violation was an alleged conspiracy among all the distributor defendants, Shea and McFaul, to give Shea a monopoly of first and second run exhibition of the distributor defendants' films in Buffalo, New York, and its environs, to the injury of three of Dipson's theatres, the Bailey, the Century and the Ridge, by concertedly refusing to license the above theatres to show motion pictures for the run[2] desired by Dipson and to which Dipson asserts the theatres were entitled by reason of their location and appointments. The case was heard by Knight, *J.*, who dismissed the entire action at the close of the plaintiff's case against Columbia and against all defendants in so far as

---

[1]Vitagraph, Inc.,* Loew's, Inc., Paramount Pictures, Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation.

*Warner Bros. Pictures Distributing Corp.

[2]The terms "clearance" and "run" are fully discussed in the *Paramount* case, 334 U. S. 131. Briefly the theatre which is licensed by a distributor to first show a given picture in a given area has the first (and ordinarily most profitable) run, the next theatre licensed to show the picture has the second run, and so on. Clearance is the time in days between the end of one run and the start of the next lower numbered run. It is the general practice in the motion picture industry to set forth the clearance and run in the agreement by which the distributor licenses the exhibitor to show a picture and the clearance and run provided are major factors in determining the film rental to be paid.

it involved the Ridge Theatre. No appeal is taken from this dismissal. This appeal is from the subsequent decision of Knight, *J.*, holding (except in so far as he dismissed the cause of action against Universal) that the plaintiff had failed to prove any conspiracy among the other defendants with respect to the Bailey and Century theatres and in addition that the plaintiff had failed to show any damage to those theatres resulting from defendants' conduct. On appeal Dipson claims as damages operating losses at the Century in the 1940-41 season, and lost profits at the Bailey for the years 1939-1946 inclusive.

The facts are as follows: One Michael Shea was one of the first—if not the first—motion picture theatre operators in Buffalo (1914). He and his successors had always had an excellent reputation for good entertainment and for meeting their obligations to the distributors. As the demand for theatres increased, he, in 1925, sold a part interest in his theatre chain to Paramount's predecessor to obtain financing to build the Buffalo theatre, still the largest in the area. In 1926, Michael Shea acquired by lease the Kensington theatre, and in 1928 the Bailey, both in northeast Buffalo. In 1928 Loew—who operated the Century—turned it over to Michael Shea in return for a part interest in the business. Michael Shea died in 1934 and McFaul, his successor, Paramount and Loew then organized the corporate defendant Shea to continue the business. In 1939 Nikitas Dipson, who controlled or was associated with a large theatre chain, commenced operations in the Buffalo area. Among the theatres that he acquired were three formerly operated by Shea: the Century, a downtown first run theatre, the Bailey, a neighborhood theatre, and the Riviera, a suburban theatre. Shea declined an opportunity to renew his leases and to continue operation of these properties. Dipson also acquired the Ridge, another suburban theatre which had been offered to Shea and refused.

By 1940, after Dipson had entered the area, there were 67 motion picture theatres in Buffalo with an aggregate capacity of 66,684 seats, of which 5 were first run. Shea operated 11 of these, including 3 of the first run theatres with a capacity of 9,979 seats, the remaining 8 being neighborhood theatres with a capacity of 9,040 seats. Three of these Shea neighborhood theatres, the Seneca, Kensington and Elmwood, were operated as second run theatres, that is, Shea showed pictures licensed to it at them before showing the same picture at its 5 other theatres and before the licensors released them to other theatres. Pictures not licensed to Shea for second run appeared in other theatres prior to 1939, and after that time also at the Bailey. The Dipson combine operated 10 neighborhood theatres with a capacity of 11,230 seats, and the first-run Century. There was one independent regular first run theatre, the Lafayette. Of the distributor defendants, only Paramount and Loew had any financial interest in the theatres here involved or in any theatres in the Buffalo area. Prior to Dipson's entry into Buffalo, the 6 percent distributor defendants[3] got ca. 59% of their Buffalo revenue from Shea theatres.

There being admittedly no direct evidence of the alleged conspiracy, plaintiff attempted to prove its existence by circumstantial evidence built around his experiences with the Bailey and Century theatres after he or his predecessors acquired them from Shea. The two theatres will be considered separately.

Bailey.

In 1926 Michael Shea obtained a lease on the Kensington theatre in northeast Buffalo. Two years later he similarly acquired the Bailey in the same general area but some 1.7 miles away. The Bailey was sold to the plaintiff in 1939.

[3]If Columbia is included the figure drops to 56%; the figures for Universal do not appear.

Plaintiff asserted that prior to 1939 it had been a second run theatre[4] but that after plaintiff acquired it, it was demoted to a third run theatre pursuant to a conspiracy among the defendants. He also asserted that the Bailey was a better theatre in every way than the Kensington so that had no conspiracy existed, the distributor defendants would have preferred to exhibit at the Bailey where their film rentals would have been higher. Had plaintiff been able to prove that all the distributor defendants had demoted the Bailey after its sale to plaintiff and that it was a superior theatre to the Kensington, there would have been a justifiable inference that a conspiracy existed as alleged. However, plaintiff was unable to do so. The Bailey had never been a wholly second run theatre but had been given some second and some third runs by Shea of the films licensed to the latter by the various distributor defendants. The Kensington was originally the only second-run theatre in the neighborhood and all the distributor defendants licensed it as such up to 1939. When the Bailey came under the same management, Shea had, with the oral consent of the distributor defendants, originally shown approximately half the pictures he exhibited second run in the neighborhood at the Bailey, and half at the Kensington. From 1936 on he had gradually shown more and more pictures second run at the Kensington so that by 1938, a majority of the product of Warner, United and RKO was showing second run at the Kensington as was a constantly increasing percentage of the product of Fox. It is not disputed that the Kensington and the Bailey were so similar in quality and location that they could not economically play "day and date," *i.e.*, each show the same feature on the same day. In other words, one had to be preferred over the other. So long as they were under common management, no difficulty arose

[4]In Buffalo there was a 30 day clearance between the first and second run.

from this fact, for most of the distributors were evidently content to let Shea determine what order of presentation would result in the greatest gross for them and for him. When they became separately managed, the distributors were forced to decide which they would license first and what clearance they would give. Dipson wanted the entire second run with a 7 to 21 day clearance over the Kensington. Shea argued that the distributors should again implement the clause in the licenses calling for a 21 day clearance in favor of the Kensington but was unable to get this treatment from any distributor. Instead of uniformly choosing the Kensington the distributors acted as follows:

1. Loew licensed the second run to the Kensington with one week clearance over the Bailey.

2. Paramount did the same.

3. Fox, which had a three year franchise agreement with Shea, licensed second run to the Kensington with no clearance over the Bailey.

4. Warner licensed half its pictures to each for second run.

5. Universal offered to license all its pictures for second run to the Bailey. This offer was not accepted by Dipson though it is not shown why it adopted that course.

6. Columbia licensed all its pictures for second run to the Bailey.

7. RKO licensed its pictures for second run to the Kensington with one week clearance over the Bailey.

8. United Artists licensed its pictures individually but generally licensed its pictures for second run to the Kensington first, with one day clearance over the Bailey.

We insert here a table indicating in summary form the actions of the distributor defendants with respect to the Bailey-Kensington and other similar situations in the area:

	BUFFALO				LACKAWANNA		TONAWANDA
			Downtown				
Distributor	Bailey (Dipson)	Kensington (Shea)	Century (Dipson)	3 Shea Theatres	Ridge (Dipson)	Lackawanna (Shea)	Riviera (4) (Dipson)
Paramount	3d run	2d run 7 days clearance		1st run	2d run	1st run	1st run
Loew	3d run	2d run 7 days clearance		1st run	2d run	1st run	1st run
RKO	3d run	2d run 7 days clearance	1st run		1st run	2d run	1st run
Fox	3d run	2d run no clearance		1st run	1st run	2d run	1st run
United	generally 3d run	2d run 1 day clearance	irregularly split among 8 theatres(1)		1st run	2d run	1st run
Warner	½ 2d run	½ 2d run	½ 1st run	½ 1st run	½ 1st run	½ 1st run	(2)
Columbia	2d run	3d run	neither (3)		(2)		(2)
Universal	Offered 2d run		neither (3)		2d run	1st run(5)	(2)

(1) ca. 8½% to the Century, 70% to the 3 Shea theatres.
(2) Not shown.
(3) Lafayette had 1st run.
(4) No Shea Theatre.
(5) 1st run offered Dipson who refused.

In summary, Paramount and Loew licensed Shea first throughout but licensed Dipson where there was no immediately competing Shea theatre; RKO preferred Shea at the Kensington, Dipson elsewhere; Fox licensed Shea first at the Kensington and downtown, Dipson elsewhere; United had no fixed policy but apparently preferred Shea at the Kensington,[5] to some extent downtown and Dipson elsewhere; Warner played no favorites, and Columbia and Universal favored Dipson or the Lafayette, a downtown theatre owned by an independent.

Far from being circumstantial evidence of a conspiracy, the conduct of the distributors tabulated above would appear to be evidence to the contrary. With the exception of Loew and Paramount,[6] who continued to exhibit their own product in theatres in which they had an interest the distributors appear to have taken independent action impelled, if anything, by a desire to favor Dipson who was a far larger exhibitor than Shea in the country as a whole.

However, the inference of conspiracy might have been sustained if Dipson could have shown that the Bailey was, from the distributor's point of view, clearly a better customer, *i.e.*, capable of producing more revenue, than the Kensington. This he failed to do. There was considerable conflict in the evidence as to which was the better appointed theatre. But, it was uncontroverted that the Kensington was in a growing, the Bailey in a declining, neighborhood. There was also dispute as to which theatre would ordinarily out-gross the other. There, however, is uncontroverted evidence that on the only occasion when the same show ("Pinocchio") played both theatres on the same day, the Kensing-

[5]United showed only about one picture a month at the Kensington and Bailey so that its actions were of minimal importance as far as Dipson's supply of film was concerned.

[6]Loew and Paramount in 1934 each signed a 10 year first run franchise agreement with Shea. This was not renewed when it expired in 1944.

ton out-grossed the Bailey. Warner, which split its product between the Bailey and the Kensington in the years 1939-1943 inclusive received almost twice as much rental from the Kensington as from the Bailey. There was also evidence showing that on the average the Bailey grossed more playing after the Kensington than it did playing comparable pictures second run. This is concededly unusual and was ascribed, apparently with good reason, to Shea's prior advertising which had benefited Dipson in view of the latter's policy not to advertise the Bailey pictures. There was also convincing evidence that the Bailey's gross was being very adversely affected by the activities of the management of the Genesee theatre. The Genessee was much closer to the Bailey than the Kensington, was of comparable quality, and charged lower admissions. One Basil, who managed and had a half interest in the Bailey, owned the Genesee and in order to favor his wholly owned theatre had violated the agreed clearance and run between it and the Bailey, there being 93 instances of this practice in the year 1940 alone.

In the light of the foregoing a conspiracy was not established because some of the distributors, when forced to choose between the Bailey and the Kensington, decided that they would gross more at once and in the long run by showing all their pictures at the Kensington first, thus continuing the established trend toward that theatre. In addition, various of the distributor defendants had additional reasons for their choice. Thus Loew, in addition to having an interest in the Kensington, had had unfortunate financial dealings with Dipson in the past. RKO and Fox had had similar experiences, and Warner's experience with Dipson at the Century was not satisfactory. The fact that Dipson, although an experienced exhibitor, was also far more of a dealer in theatres than Shea, was a further factor in the decisions of some distributors to prefer the Kensington.

The Century.

The Century was one of five first run theatres in Buffalo. One of the remaining four[7] was independent, the balance were operated by Shea. (Great Lakes, Buffalo and Hippodrome). The Buffalo and the Great Lakes were the best located and appointed and it had been Shea's policy even when it controlled the Century to play the top pictures at them rather than at the Century. Warner and possibly other distributor defendants also insisted on this. In addition to not being in the center of the downtown theatre district,. the Century was in poor physical condition, and Dipson's successor spent over $50,000 restoring it before it became profitable. Even under Shea management the Century lost money and Shea did not renew its lease when it expired in 1939. Under Dipson management the Century showed first run the pictures of RKO and one-half of Warner; the Lafayette (an independent) showed Columbia and Universal; Shea showed Loew, Paramount, Fox and one-half of Warner, and United showed at all five theatres as well as at certain others, approximately 9% of its product appearing at the Century. Thus Dipson with 20% of the theatres showed the pictures of about 20% of the distributors, and Shea with 60% of the theatres showed the product of somewhat less than 60% of the distributors. It also appears that Dipson actually showed a better grade of pictures at the Century than Shea had. Dipson also lost money on the Century but after it passed into other hands which exhibited the same product as Dipson had it became a profitable property. Dipson surrendered the Century lease in 1941. At that time it blamed its lack of success not on the actions of the defendants but on a nation-wide decline in motion picture attendance.

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[7]Certain other independent theatres occasionally played first runs.

From the above it can be seen that there is no evidence that the distributor defendants combined to deny Dipson access to first run films at the Century. It got some of the product of Warner and United, and all of RKO. Columbia and Universal had never licensed the Century before or after its acquisition by Dipson. Any substantially different pattern of distribution in Dipson's favor would have been an unfair discrimination against Shea or the independent first run exhibitor.

Shea entered into no tie in arrangements, *i.e.*, agreeing to show film first run only if favored in the second, or vice versa, nor did it ever preempt the supply of films by contracting for more films than it could exhibit.

After the above facts had been brought out at the trial, Knight, *J.*, who had had extensive experience in motion picture anti-trust cases, decided that no conspiracy had been shown and that the distributor defendants had merely exercised their independent and individual right to select their own customers.[8] He also held that Dipson had shown no damage resulting from the actions of the defendants. His opinion was subsequently supported by detailed findings. Dipson now asserts that it has met the heavy burden of showing that these findings and conclusions are clearly wrong.[9] On this appeal Dipson seems to have assumed that the decision in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, settled the question that a conspiracy

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[8]"It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor." *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312.

[9]For the extent of this burden see *United States* v. *Yellow Cab Co.*, 338 U. S. 338.

existed among the defendants in this case and that citation of that authority alone justifies a reversal. Hence the majority of its argument is directed at the holding that it had suffered no damage as a result of defendants' conduct. That is not the case. True, the eight distributors who were originally defendants here were defendants there and were there found to have violated the Sherman Act by conspiring to and restraining trade in the exhibition of motion pictures by fixing admission prices, setting unreasonable clearances and runs, and requiring block booking. Joint ownership of theatres was found to facilitate this conspiracy and was, with certain exceptions, enjoined. However, we have already had occasion to pass on the question of whether the *Paramount* case, *supra,* is conclusive of the question of conspiracy among the distributor defendants in a private treble damage action involving a single city. We answered in the negative, and in *Fifth and Walnut* v. *Loew's Incorporated,* 176 F. 2d 587, we said, at 590:

"It is of the essence of plaintiffs' argument that 'but for the fact that a Jury had to pass upon the question of damages,' a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the court. It was not the move-over arrangement itself that was condemned in United States v. Paramount Pictures, Inc., 334 U. S. 131, 159, 160. * * * but rather the discriminatory fashion in which move-over privileges were accorded to distributors * * *

"Likewise, the joint operation of the Brown Theatre by one independent exhibitor and a subsidiary of one of the

defendants (Loew's) was a type of activity which would not be unlawful unless a conspiracy to monopolize or restrain commerce by means of that activity was found by the jury to exist as to some of the defendants in the present action. The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made. * * *"

Also the expediting court in the *Paramount* case specifically held, contrary to Dipson's position, that "the decision of such controversies as may arise over clearances should be left to local suits in the area concerned." 66 F. Supp. 323, 342. The fact that plaintiff now concedes that Columbia and Universal were not parties to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here. There is also no showing that evidence of the Buffalo situation was introduced or relied upon by the government in proving the conspiracy in the *Paramount* case. Therefore we must look to the record in this case to see if Dipson has shown that the general conspiracy found to exist in the *Paramount* case, or some other conspiracy, had as one of its objects or effects the monopolization of the first and second run exhibition of pictures in the Buffalo area and that he suffered injury as a result. Of

course, the activities revealed in the *Paramount* case led us to scrutinize with great care the activities of the same defendants here for where one has violated the Sherman Act in one situation, it might be expected that the same parties would be willing and able to do so elsewhere.

It will simplify matters if the defendants are split into four groups: one, the distributors RKO, United and Warner, who neither owned theatres in Buffalo nor had franchise agreements with Shea; two, Fox, who had a first and second run franchise agreement with Shea; three, Loew and Paramount who not only between them controlled Shea but up to 1944 had a first run franchise agreement with Shea; four, Shea and McFaul, the exhibitor defendants.

In considering evidence of a conspiracy it should be kept in mind that there are a limited number of pictures available for exhibition so that what one exhibitor gets for a given run is necessarily not available to his competitor.[10] A distributor is, therefore, by the very act of distributing pictures, favoring some exhibitors at the expense of others. At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed. Thus there is nothing illegal in the mere fact that Dipson could not get all the pictures it wanted for the runs it wanted. If it had done so it would have been subject to the same sort of legal action it is now maintaining against the defendants.

We agree with the trial judge that the first group of defendants—RKO, United and Warner—have not been shown to have been parties to a conspiracy. The mere

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[10]The process is well summarized in *Westway Theatre* v. *Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 834, *aff'd on opinion below* (4th Cir.), 113 F. 2d 932.

tabulation of their diverse actions with respect to Shea and Dipson is alone enough to support the decision below since all direct evidence of a conspiracy is lacking. Dipson's allegations in its brief that the actions of these defendants were only taken after clearance with and on sufferance of Shea are entirely unsupported by the record and even had such conspiracy existed no reason for such sufferance is suggested.

Fox, as we have indicated, favored Dipson except where it was bound by its first and second run franchise[11] with Shea. Such franchises are not illegal *per se* and the fact that Fox and Shea entered such an agreement in 1937 is not significant. At that time Shea controlled a larger percentage of first and second run theatres than it did after Dipson entered the area and such an agreement was quite logical for both parties. By it, and its franchises with Loew and Paramount, Shea assured itself of a basic supply of pictures and Fox was assured that its product would be exhibited by the best first and second run exhibitor in Buffalo. Dipson was not even on the scene when the franchise agreement was signed. Fox did not blindly follow the lead of Loew and Paramount for it gave Dipson all it could under its agreement with Shea, that is, a run at the Bailey immediately after the Kensington, whereas the others insisted on seven days clearance. Dipson asserts that the conspiracy existed in 1939 and Fox was a party. We are convinced to the contrary. Nor do we think that the renewal of the franchise in 1940 was shown to have been improper. Early in 1940 Nikitas Dipson, the president of Dipson wrote one Samson, Fox's Buffalo representative, asking that Dipson be considered as a Fox first run outlet when Fox's franchise with Shea expired. Samson forwarded this letter to Fox's head office in New York and so

[11]A franchise is a license extending for more than one exhibition season.

informed Dipson. After Nikitas Dipson let the matter drop for three months, he wrote Kent, Fox's president, direct, who, after investigating the matter, replied that a renewal of the franchise had been negotiated some weeks before and that in any event the Shea account had been so satisfactory that Fox would have exhibited in his first run theatres rather than in the Century. We have already shown that the Century was a far less desirable outlet than the Shea theatres. There is no correspondence in the record to show that Dipson ever asked for Fox's second run product. As we have already indicated, the choice of Fox under such circumstances to license its product to Shea for another three years rather than for just one year did not show that it and the two remaining groups of defendants were conspiring to harm Dipson.

After eliminating Fox, RKO, United and Warner, from the alleged conspiracy it remains to determine if there was sufficient evidence to support the decision of Knight, *J.*, that no conspiracy existed between Loew and Paramount on the one hand and Shea and McFaul on the other that the former would exhibit their pictures first and second run solely with the latter. As sufficient to overcome Knight *J's.* decision, Dipson points out that Paramount and Loew each had a double connection with Shea in that each had a large financial interest in it, Paramount since 1925, Loew since 1928; that since Shea's corporate organization in 1934 both had had ten year first run franchise agreements with it (the franchises expired in 1944 and were not renewed); that, although they had no second run franchise with Shea, each of them licensed Shea for second run at the Kensington, rather than Dipson at the Bailey.

As was the case with Fox, the franchises could not have been aimed at Dipson as the latter was not in Buffalo when they were made, but this does not mean that a con-

spiracy could not have originated then to which Dipson later fell victim, or that a conspiracy could not have arisen after Dipson entered Buffalo, although the latter is not even alleged. Shea's failure to retain control of the Century and Bailey in 1939 is support for the finding that no conspiracy existed before that time and franchises executed in 1934 are not evidence of a conspiracy arising in 1939. Officers of both Loew and Paramount testified that it was the policy of each to favor theatres in which they had an interest, all other things being equal. This was to be expected,[12] and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually. As we have already indicated, joint ownership of theatres by distributors is not illegal *per se* though the practice had given rise to sufficient abuse so that it was condemned in the *Paramount* case and both Paramount and Loew have since consented to surrender their interest in Shea.

Had a monopoly been obtained by Shea we might have viewed the question differently but Shea did not have a monopoly of first and second run theatres in Buffalo and Loew and Paramount did not have a monopoly of available films. Shea did not use first run buying power to get second run preference, or vice versa, nor indeed has any such abuse been claimed. Nor did it attempt to exclude Dipson by contracting for more films than it could use. Dipson could and did obtain sufficient films to exhibit at the Century and Bailey (although it did not obtain all it desired). Had a monopoly been the aim of Loew and Paramount, they would have caused Shea to retain control of the Century and Bailey. We hold that their activities

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[12]The consent decree entered into by Paramount in 1940 specifically preserved its right to favor its own theatres.

did not show a joint action that should upset the finding that no conspiracy existed between them.[13]

There is also an inherent lack of plausibility in the complaint as a whole. If the defendants were engaged in a conspiracy to monopolize first and second run exhibitions in Buffalo, why would Shea fail to retain control of the Bailey and the Century in 1939, when it appears that it was offered a chance to buy the Bailey and renew the lease on the Century? If the theatres were as profitable as Dipson would have us believe, Shea would naturally have kept them. Furthermore, the complaint was dismissed as to the defendants Universal and Columbia and in so far as it applied to the Ridge Theatre, and no appeal has been taken from the dismissal. A conspiracy among the six remaining distributor defendants aimed at only two of the plaintiff's many theatres while all but Paramount and Loew favored the plaintiff elsewhere (and even they licensed it in Tonawanda) would seem to have been futile. Such a conspiracy would be entirely different from that shown in the *Paramount* case which apparently favored large combines such as Dipson. Also RKO, United and Warner did not regularly favor Shea even in the two theatres remaining at issue.

Dipson makes much of the fact that it was unable to get the runs it wanted on any terms, but there is no evidence that it offered the distributor defendants better terms than they were getting from Shea, in fact Dipson willingly agreed in 1943 to take all Warner's product third run at the Bailey in return for a reduction in film rental. As we have said, had Dipson's demands been acceded to by the

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[13]Compare the facts in this case with those shown where a conspiracy was found to exist. E.g., *Ball* v. *Paramount Pictures*, 3 Cir., 167 F. 2d 317; *William Goldman Theatres* v. *Loew's, Inc.*, 3 Cir., 150 F. 2d 738, *cert. den.* 338 U. S. 811.

distributors it would have secured a monopoly with far less reason to support it than Shea has ever had. There is evidence that Dipson wanted all or nothing from each distributor and testimony from its own witness that its aim was a monopoly.

In summary, the plaintiff only alleges a conspiracy with respect to runs and the conduct of the distributor defendants fails to indicate that any such conspiracy existed. Except for Loew and Paramount, all the distributor defendants gave plaintiff the run it desired in some of its theatres where it competed with Shea. Loew and Paramount could legally favor their own theatres and plaintiff was able to obtain sufficient pictures for its theatres.

In view of the foregoing we find that Judge Knight's conclusion as to the lack of any conspiracy affecting the Bailey and Century was supported by the evidence and must be sustained. As we affirm the decision below on the ground that no illegal conspiracy is shown, it is unnecessary to discuss so much of that opinion as held that conspiracy or not, plaintiff had suffered no damages. Suffice it to say that it appears from the record that there were many reasons given by the appellees which would explain Dipson's lack of financial success even in the absence of conspiracy and would negative any inference of conspiracy that might arise from the existence of unexplained damages or losses. The losses at the Century seem to have been the result of bad management, and at the Bailey seem in large part due to bad management, unfair competition by the Genesee and a general decline in the neighborhood.

Affirmed.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

DIPSON THEATRES, INC.
Plaintiff

vs.

BUFFALO THEATRES, INC. *et al.*
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial and the court, having heard the evidence, and after due consideration, makes the following Findings of Fact and Conclusions of Law:

FIRST: The plaintiff, Dipson Theatres, Inc. is a corporation organized under the laws of the State of New York in 1939 as D & B Operating Co. Inc., which name was changed in 1940 to Dipson Theatres, Inc. The corporation had an original invested capital of One Hundred Dollars ($100.00), which was never increased.

SECOND: Century Theatrical Enterprises, Inc. (hereinafter called "Century") was a corporation organized under the laws of the State of New York in 1939, with an invested capital of Five Hundred Dollars ($500.00) which was never increased. On December 18, 1941, Century was dissolved.

THIRD: Dipson Realty Co. Inc. is a corporation organized under the laws of the State of New York in 1939 as Dipson-Basil Theatres, Inc., which name was changed in 1940 to Dipson Realty Co. Inc. Dipson Realty Co. Inc. had a nomi-

nal original invested capital which has never been increased. Dipson Realty Co. Inc., Century and the plaintiff were all organized by Nikitas Dipson.

FOURTH: Nikitas Dipson controlled and operated a large number of moving picture theatres in various parts of the United States and was an experienced motion picture operator. Prior to 1939 he had no interests or experience in the motion picture exhibition business in the City of Buffalo or its environs.

FIFTH: The defendant, Buffalo Theatres, Inc. (hereinafter called "Buffalo") is a corporation organized under the laws of the State of New York in 1934 and at all times hereinafter mentioned maintained an agent in the City of Buffalo, New York, and was engaged in the business of exhibiting motion pictures in the City of Buffalo and its environs.

SIXTH: The defendant, Bison Theatres Corporation was a corporation organized under the laws of the State of New York in 1934. It was a wholly owned subsidiary of Buffalo and was engaged in the business of exhibiting motion pictures in the City of Buffalo and its environs. Bison Theatres Corporation was dissolved on April 6, 1940.

SEVENTH: The defendant, Vitagraph, Inc. was a corporation organized under the laws of the State of New York and on or about July 20, 1944, it changed its name to Warner Bros. Pictures Distributing Corporation (hereinafter Vitagraph, Inc. and Warner Bros. Pictures Distributing Corporation will be called "Warner"). At all times hereinafter mentioned, Warner has been engaged in the business of distributing motion pictures throughout the United States.

EIGHTH: The defendants, Loew's Incorporated (hereinafter called "Loew's"), Paramount Pictures, Inc. (hereinafter

called "Paramount") and Twentieth Century-Fox Film Corporation (hereinafter called "Fox") are corporations. Loew's was organized and exists under the laws of the State of Delaware. Paramount and Fox were organized and exist under the laws of the State of New York. At all times hereinafter mentioned, each of these defendants was engaged in the business of producing, distributing and exhibiting, either directly or through subsidiaries, motion pictures throughout the United States and each maintained an exchange or branch office in the City of Buffalo through which it serviced theatres located in Buffalo and other parts of Western New York.

NINTH: The defendants, RKO Radio Pictures, Inc. (hereinafter called "RKO"), Universal Film Exchanges, Inc. (hereinafter called "Universal") and United Artists Corporation (hereinafter called "United Artists") are corporations organized and existing under the laws of the State of Delaware. At all times hereinafter mentioned, each of these defendants was engaged in the business of distributing motion pictures throughout the United States and each of the defendants maintained an exchange or branch office in the City of Buffalo through which it serviced theatres located in Buffalo and other parts of Western New York. The motion pictures distributed by United Artists are produced by independent producers.

TENTH: The defendant, Columbia Pictures Corporation, (hereinafter called "Columbia") is a corporation organized and existing under the laws of the State of New York. At all times hereinafter mentioned, it was engaged in the business of producing and distributing motion pictures throughout the United States and maintained an exchange or branch office in the City of Buffalo through which it serviced theatres located in Buffalo and other parts of Western New York.

ELEVENTH: The defendant, Vincent R. McFaul, has been engaged in the operation of motion picture theatres in Buffalo

and its environs for upwards of thirty-five years. He became president of Buffalo Theatres, Inc. upon its incorporation and at all times hereinafter mentioned has retained that office.

TWELFTH: Marcus Loew Booking Agency, Inc. is a wholly owned subsidiary of Loew's and from October 1940 to the date of the institution of this action, acted as the buyer and booker of motion picture films for the defendant, Buffalo.

THIRTEENTH: Michael Shea, from 1914 until his death in 1934, operated a number of motion picture theatres in Buffalo which are hereinafter referred to as the "Shea theatres". In 1925, Famous Players-Lasky Corporation, a predecessor of Paramount, became financially interested in the Shea theatres. In 1934, Buffalo was organized to take over the management and operation of the Shea theatres.

FOURTEENTH: The capital stock of Buffalo was originally equally divided between Loew's, Paramount and the McNaughton Realty Corporation. In 1935, Vincent R. McFaul acquired 40% of the holdings of the McNaughton Realty Corporation and, in 1944, Loew's and Paramount each bought one-half of the remaining interests of the McNaughton Realty Corporation. From 1944 to the time of the filing of the complaint herein, the stock of Buffalo has been owned by Loew's, Paramount and Vincent R. McFaul.

FIFTEENTH: From the time of its organization up to 1939, Buffalo or its subsidiary, Bison Theatres Corporation, operated the following first-run theatres in downtown Buffalo—Buffalo, Great Lakes, Hippodrome and Century, and the following subsequent run theatres in various communities in and around Buffalo—Seneca, Kensington, Bailey, Elmwood, North Park, Roosevelt, Riviera and Kenmore.

SIXTEENTH: Subsequent to 1939, Buffalo operated three first-run theatres in downtown Buffalo, Buffalo, Great Lakes

and Hippodrome, and eight subsequent run theatres located in and around Buffalo—Seneca, Kensington, Elmwood, North Park, Roosevelt, Kenmore, Niagara and Lackawanna. At this time there were in Buffalo and its immediate suburbs approximately seventy-nine motion picture theatres with an aggregate of 77,312 seats. Buffalo operated 11 theatres with an aggregate of approximately 20,101 seats.

SEVENTEENTH: Subsequent to 1939 there were five first-run theatres in downtown Buffalo of which the defendant, Buffalo operated three—Buffalo, Great Lakes and Hippodrome. The other two first-run theatres, namely, Century Theatre and the Lafayette Theatre were operated by exhibitors who had no affiliation or connection with any of the defendants.

EIGHTEENTH: The Century Theatre is located approximately one and a half blocks from the nearest first-run Shea Theatre. The three first-run Shea Theatres namely, the Buffalo, the Great Lakes and the Hippodrome are all located on Main Street approximately one-quarter of a mile west of the Century Theatre and for many years both prior and subsequent to 1939, the location of these three theatres has constituted the theatre district in the City of Buffalo. The Century is an older theatre than either the Buffalo or the Great Lakes Theatres and its location is substantially inferior for motion picture exhibition purposes to the location of the Buffalo, Great Lakes and Hippodrome Theatres. At all times prior to June, 1941, the equipment and appointments of the Century Theatre were inferior to the equipment and appointments of the Buffalo and Great Lakes Theatres.

NINETEENTH: Prior to 1939, Buffalo operated the Century Theatre under a lease from the owner, Midland Properties, Inc. During the last two years of its operation, Buffalo sustained substantial losses at the Century. On August 1, 1939, Buffalo's lease on the Century Theatre expired. Prior thereto

the owner of the Century Theatre had demanded an increased rental for the theatre as a condition for a renewal of the lease. Buffalo refused to renew the lease at increased terms and on May 1, 1939, the theatre was leased to Century at the increased rental demanded by the owner. Neither Buffalo nor any officer, stockholder or subsidiary thereof made any attempt to hinder or prevent the leasing of the Century Theatre to Century or to any other person or corporation.

TWENTIETH: Prior to 1939, the motion pictures distributed by Loew's, Paramount, Fox, Warner, RKO and United Artists were generally exhibited on first run at the four theatres operated by Buffalo in downtown Buffalo. The better pictures were exhibited at the Buffalo and Great Lakes and the lesser pictures were exhibited at the Hippodrome and Century Theatres. Certain of the defendant distributors insisted that their better pictures be exhibited first-run at the Buffalo or Great Lakes Theatres and it was the experience of Buffalo that the better pictures produced larger grosses when exhibited at the Buffalo or Great Lakes Theatres.

TWENTIETH (A): During the period in controversy, Fox licensed its pictures for exhibition on first and second runs in the City of Buffalo to Buffalo. Such licenses were negotiated solely by the Buffalo branch manager of Fox who acted without consultation, discussion or concert of action with any of the other defendants and in the exercise of his own independent business judgment.

TWENTY-FIRST: Prior to 1939, the motion pictures distributed by Columbia and Universal were generally exhibited on first run in Buffalo at the Lafayette Theatre.

TWENTY-FIRST (A): Subsequent to the acquisition of the Century Theatre by Century, Columbia and Universal continued to license their motion pictures for first run exhibition

in Buffalo at the Lafayette Theatre and refused to license their pictures for first-run exhibition at the Century Theatre because of the satisfactory business relationship which had existed for many years between Columbia, Universal and the Lafayette Theatre.

TWENTY-FIRST (B): During the period of time involved in this action and for many years prior thereto, the Lafayette Theatre was and now is a large, well appointed and well managed theatre, located in the downtown section of the City of Buffalo and was and is in all respects a suitable theatre for the first run exhibition of motion pictures.

TWENTY-SECOND: Subsequent to the acquisition of Century Theatre by Century, there were no changes in established exhibition policies in any of the theatres operated by Buffalo. From time to time Buffalo, as it had in the past, changed its admission prices or playing policies in one or more of its first-run theatres to meet changing economic conditions and public tastes. Except for licensing a reasonable number of feature pictures for exhibition in its first-run theatres, nothing whatsoever was done by Buffalo or any of its officers or stockholders for the purpose or the effect of interfering with or preventing the licensing of any motion pictures for first-run exhibition in the Century Theatre.

TWENTY-THIRD: For the seasons 1939-40 and 1940-41, Buffalo sought to obtain an adequate supply of motion pictures for first-run exhibition at its three downtown theatres. At no time did it contract for more first-run pictures than were reasonably required for the proper operation of the three first-run theatres. Thereafter Marcus Loew sought to obtain an adequate supply of motion pictures for first-run exhibition at Buffalo's three downtown theatres. At no time did it contract for more first-run pictures than were reasonably required for the proper operation of the three first-run theatres.

TWENTY-FOURTH: At all times herein involved, United Artists licensed the feature motion pictures which it distributed individually, picture by picture. Starting with the 1941-42 season, Paramount, Loew's, Warner, Fox and RKO each licensed its feature motion pictures either in small groups, usually of five or less, or individually. Since about June, 1946, each of those distributor defendants has licensed its feature motion pictures individually, picture by picture. Columbia and Universal continued to license their feature motion pictures on a seasonal basis until the date of the institution of this action.

TWENTY-FIFTH: Subsequent to Century's acquisition of the Century Theatre lease in 1939, RKO licensed to Century for first run exhibition at the Century Theatre all of the motion pictures distributed by RKO during the 1939-40 and the 1940-41 seasons, with one exception—a total of 89 out of 90 pictures. This exception was a picture entitled "Pinnochio", a Walt Disney independently produced picture which had been committed to Buffalo for exhibition by RKO previous to Century's acquisition of the Century Theatre lease.

TWENTY-SIXTH: Subsequent to its acquisition of the Century lease, Century entered into contracts with Warner under which 18 of the motion pictures distributed by Warner during each of the 1939-40 and 1940-41 seasons were licensed to Century for first run exhibition at the Century Theatre. The motion pictures so licensed were equal in number and were at least equal in quality to the Warner pictures which had been exhibited at the Century Theatre during the two preceding seasons of Buffalo's operation of the Century.

TWENTY-SEVENTH: During the period of the operation of the Century Theatre by Century, the pictures which Century exhibited at the Century Theatre on first run, were, on the average, superior in quality to the pictures which had been

exhibited at the Century Theatre on first run during the period of its operation by Buffalo.

TWENTY-EIGHTH: From the time Century took over the operation of the Century Theatre to June, 1941, Century was unable to operate the Century Theatre at a profit. The failure to operate at a profit was attributable to a combination of circumstances, including the lack of previous experience of the management in a first run operation in Buffalo; failure of the management properly to exploit its pictures by adequate advertising, promotion and publicity; changes of admission prices; experiments with playing policy and the presentation of stage shows of a burlesque character which were detrimental to the successful operation of a first-run theatre in Buffalo.

TWENTY-NINTH: The Riviera Theatre is located in North Tonawanda, New York, a suburb of Buffalo. Smith Properties, Inc. leased it to Century on or about July 1st, 1939. Smith Properties, Inc. and Midland Properties, Inc., the owner and lessor, of the Century Theatre, were and still are completely different corporate entities, and the lease of the Riviera Theatre to Century was not conditioned, either expressly or impliedly, upon the lease of the Century Theatre to Century.

THIRTIETH: During the period of its operation by Century, the Riviera Theatre exhibited the principal pictures of all of the defendant distributors, upon terms and on runs satisfactory to Century. The operation of the theatre during this period was profitable and no claim is made that any of the defendants hindered or interfered with such operation.

THIRTY-FIRST: On or about June 30, 1941, the directors of Century, at a meeting, referred to a puzzling drop in motion picture theatre attendance throughout the country during the months of April, May and June of 1941, and to the fact that they were unable to operate the Century Theatre at a profit.

At this meeting the directors authorized and directed the officers of Century to surrender its leases on the Century Theatre and the Riviera Theatre. On the same day Century voluntarily surrendered these leases.

THIRTY-SECOND: In voluntarily surrendering its lease of the Century Theatre, Century was motivated in part by the general business conditions prevailing in the motion picture industry and in part by the belief that it would be able to negotiate a new lease with the owners of the theatre at a reduced rental. Subsequent to the surrender of the lease, Century and plaintiff made repeated attempts to negotiate a new lease with the owners of the theatre. The surrender of the leases of the Century and the Riviera Theatres was not occasioned by lack of feature motion pictures for exhibition in these theatres, nor by any act or acts of any of the defendants.

THIRTY-THIRD: Subsequent to the surrender of the lease of the Century Theatre, the operation of the theatre was taken over by the landlord, Midland Properties, Inc., which, after the expenditure of substantial sums of money in physical improvements and advertising, operated the theatre at a substantial profit, exhibiting the motion pictures distributed by RKO and a steadily decreasing number of those distributed by Warner. The motion pictures exhibited in the Century Theatre subsequent to June 30, 1941, were comparable, both in quantity and quality, to the pictures available to Century during the period of its operation of the Century Theatre.

THIRTY-FOURTH: At the time of the voluntary surrender of the lease of the Century Theatre and as part of the consideration therefor, Century assigned all of its assets, with the exception of the office equipment, office improvements and office furnishings, to Midland Properties, Inc., the owners of the Century Theatre.

THIRTY-FIFTH: On November 25, 1941, a meeting of some of the stockholders of Century was held. No notice of said meeting was given to the stockholders and the stockholders of record of 40% of the stock were not represented at the meeting, either in person or by proxy. At such meeting, the stockholders present purported to authorize the officers of Century to transfer all of its remaining assets to the plaintiff corporation in consideration of the plaintiff corporation assuming the obligations of Century and cancelling the debt owed to the plaintiff by Century.

THIRTY-SIXTH: No action was taken by Century or by any of its officers or directors to carry out the purported authorization to transfer its remaining assets to the plaintiff and none of its remaining assets were in fact transferred to the plaintiff. No action was taken by the plaintiff or by any of its officers or directors to accept any purported assignment of any assets of Century, upon such terms. None of the assets of Century were received by the plaintiff, and the plaintiff did not assume the liabilities of Century to cancel the debt owed it by Century.

THIRTY-SEVENTH: Neither at the time Century surrendered its lease on the Century Theatre, nor at the time it purported to dispose of its remaining assets, nor at any other time, did Century or any of its officers, directors or stockholders intend to assign or transfer to the plaintiff any claim or cause of action against the defendants herein or any of them. Century never assigned or transferred to the plaintiff any claim or cause of action against the defendants herein or any of them.

THIRTY-EIGHTH: Neither at the time Century surrendered its lease on the Century Theatre, nor at the time it purported to dispose of its remaining assets, nor at any other time, did the plaintiff or any of its officers, directors or stockholders intend to accept or take any assignment from Century of any claim or cause of action against the defendants herein or any of them.

The plaintiff never accepted or took any assignment from Century of any claim or cause of action against the defendants herein or any of them.

THIRTY-NINTH: In negotiating with each distributor defendant for licenses for the first-run exhibition of motion pictures, neither Buffalo, Marcus Loew or McFaul conditioned the taking of any license for such first-run exhibition upon the distributors' granting a license for the second-run exhibition of the same or any other pictures in any subsequent run theatre or theatres operated by Buffalo, or in any other theatre, for which Marcus Loew was buying and booking pictures.

FORTIETH: Buffalo, Vincent R. McFaul and Marcus Loew did not at any time conspire or combine to harm, oppress or deprive Century Theatre of motion pictures, nor did they monopolize or attempt to monopolize the exhibition of motion pictures at first run in the City of Buffalo.

FORTY-FIRST: In licensing its motion pictures for first run exhibition in Buffalo, each of the defendant distributors acted independently, without consultation or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its officers or representatives respecting the theatre or theatres from which it would derive the greatest possible amount of film license revenue from the first run exhibition of its pictures in Buffalo.

FORTY-SECOND: The defendant distributors, or any two or more of them, did not at any time conspire or combine to harm, oppress or deprive Century Theatre from first run motion pictures, nor did they monopolize or attempt to monopolize, the exhibition of first run pictures in the City of Buffalo.

FORTY-SECOND (A): The defendants have at no time imposed any unreasonable clearance against the plaintiff or any other exhibitors in the Cities of Buffalo, Lockport or Tonawanda for the benefit of any of the other defendants herein.

FORTY-THIRD: Kensington Theatre is located in the City of Buffalo in the center of a business and residential section which has had a continued growth since the opening of the theatre in 1926. Beginning in 1926, the Shea interests leased the theatre and licensed motion pictures for exhibition at the Kensington on a first-run east of Main Street.

FORTY-FOURTH: In 1928, the Shea interests took an assignment of the lease of the Bailey Theatre which is located 1.7 miles south of the Kensington Theatre.

FORTY-FIFTH: By 1936, Buffalo was showing half of the better pictures at the Kensington ahead of the Bailey and half at the Bailey ahead of the Kensington. Thereafter, and in the 1937-1938 season, the management began to show more of the better pictures at the Kensington ahead of the Bailey.

FORTY-SIXTH: Prior to the expiration of the lease of the Bailey Theatre, the owners refused to renew the lease but offered to sell the theatre to Buffalo. Buffalo refused to purchase the theatre at the price demanded and thereafter, it was offered and sold to the plaintiff at that price. Neither Buffalo nor any of its officers, directors or stockholders hindered or in any way interfered with the sale of the Bailey Theatre to the plaintiff.

FORTY-SEVENTH: After the acquisition of the Bailey Theatre by the plaintiff, Buffalo attempted to negotiate contracts with various of the defendant distributors for the exhibition of their pictures at the Kensington Theatre twenty-one days ahead of the Bailey Theatre. None of the defendant dis-

tributors granted the clearance requested. Paramount, Loew's and RKO each licensed its pictures for exhibition at the Kensington Theatre with seven days clearance over the Bailey Theatre. Warner licensed half of its pictures to the plaintiff for exhibition at the Bailey Theatre with a seven days clearance over the Kensington Theatre and the remaining half were licensed to Buffalo for exhibition at the Kensington with a seven days clearance over the Bailey. This division was equal both quality-wise and quantity-wise. Fox licensed its pictures to plaintiff for exhibition at the Bailey Theatre on a run immediately after the Kensington Theatre. United Artists generally licensed its pictures for exhibition at the Kensington Theatre with a one day clearance over the Bailey Theatre. Universal made all its pictures available to the plaintiff for exhibition at the Bailey Theatre ahead of the Kensington Theatre but the plaintiff refused to license such pictures. Columbia licensed all its pictures to the plaintiff for exhibition at the Bailey Theatre. The seven days clearance granted by some of the distributor defendants later was reduced to three days and then to one day.

FORTY-SEVENTH (A): Prior to the plaintiff's acquisition of the Bailey in 1939, RKO exhibited its better pictures and a majority of its pictures at the Kensington ahead of the Bailey and in the 1937-38 and 1938-39 seasons RKO received more money in license fees from the exhibition of its pictures at the Kensington than at the Bailey. In the 1939-40 seasons and thereafter, the Buffalo branch manager of RKO had the sole authority to make the decision, determination and choice for RKO as to the run of its pictures at the Bailey and the Kensington. The decision, determination and choice by RKO's Buffalo branch manager of the Kensington for the exhibition of RKO pictures on a run prior to the Bailey in the 1939-40 season and thereafter were made solely by him, without consultation, discussion or concert of action with any of the other

defendants, were based on good and sufficient business reasons and were made in the exercise of his own independent business judgment.

FORTY-SEVENTH (B): In 1943, the plaintiff agreed to play all of the defendant Warner's pictures one day after the Kensington in consideration of securing from Warner substantial price reductions in film rental. Thereafter, the plaintiff licensed all Warner pictures for exhibition at the Bailey Theatre one day after the Kensington Theatre and secured from Warner substantial price reductions in film rental.

FORTY-SEVENTH (C): During the period in controversy, United Artists furnished an average of one picture per month to the Bailey and Kensington Theatres. The average amount of money which United Artists received per year for the licensing of its motion pictures was $3,082.69 in the Kensington Theatre and $1,993.13 in the Bailey Theatre.

FORTY-EIGHTH: Plaintiff at no time offered to pay higher prices for pictures to any of the distributor defendants for a run at the Bailey ahead of the Kensington Theatre than such distributors were receiving from Buffalo for the pictures exhibited at the Kensington Theatre.

FORTY-NINTH: At all times subsequent to 1929, the Genesee Theatre, owned by the Basil chain, was located on Genesee Street, in the City of Buffalo, approximately one-half mile from the Bailey Theatre and in the same business and residential community. It was comparable to the Bailey Theatre in appointments and was the most immediate competitor of the Bailey Theatre.

FIFTIETH: Beginning in 1939, both the Bailey Theatre and the Genesee Theatre were operated under the same management. Beginning in 1939, the twenty-one day clearance

which was formerly accorded to the Bailey Theatre over the Genesee Theatre by contracts with the various distributors of motion pictures was, with the consent of the plaintiff, reduced to fourteen days and subsequently, in the year 1941, the clearance was reduced to seven days. On over ninety occasions during the year 1940, the plaintiff permitted the Genesee Theatre to play pictures at earlier dates than provided by the clearance provisions of the contracts between the plaintiff and the distributors.

FIFTY-FIRST: During the period of these clearance waivers and changes in contractual clearance permitted by the plaintiff, the admission price at the Genesee Theatre was lower than at the Bailey Theatre and as a result patronage was diverted from the Bailey Theatre to the Genesee Theatre, causing a substantial diminution in the gross receipts of the Bailey Theatre.

FIFTY-SECOND: No basis for comparison exists between the gross receipts of the Bailey Theatre in 1938 and 1940 because of differences in management, advertising and operation, and the impact of the Genesee Theatre clearance violations and changes in contractual clearance on the gross receipts of the Bailey Theatre in 1940.

FIFTY-THIRD: The accepted method in the industry of computing expenses and receipts in the exhibition of motion pictures is the so-called unit system under which a week is divided into ten (10) units of playing time. One unit is assigned to each day of the week except Saturday is counted as two units and Sunday is counted as three units. The gross receipts obtained from the exhibition of a picture is divided by the units of playing time to obtain a unit gross.

FIFTY-FOURTH: The average unit gross received by the plaintiff on 128 pictures played at the Bailey Theatre clear or ahead of the Kensington Theatre was $213.30 per unit and

the average unit gross received by the plaintiff on 127 comparable pictures played at the Bailey Theatre soon after they had been exhibited at the Kensington Theatre was $258.00 per unit.

FIFTY-FIFTH: The average unit gross received by the plaintiff on all pictures played at the Bailey Theatre clear or ahead of the Kensington Theatre was $220.72 and the average unit gross received by the plaintiff on all pictures played at the Bailey Theatre after they had been exhibited at the Kensington Theatre was $230.82.

FIFTY-SIXTH: Buffalo, Vincent R. McFaul and Marcus Loew did not conspire or combine to interfere with or to harm, oppress or deprive the Bailey Theatre, or the plaintiff, of motion pictures, or any particular run of motion pictures, nor did Buffalo , McFaul and Marcus Loew monopolize, or attempt to monopolize, the exhibition of motion pictures on any subsequent run or runs in the City of Buffalo and its environs.

FIFTY-SEVENTH: Subsequent to 1939, Buffalo and Marcus Loew conducted separate negotiations with various of the defendant distributors for licenses for the exhibition of motion pictures at the Kensington Theatre. Separate contracts for such licenses were entered into with various of the defendant distributors and these contracts were not conditioned upon Buffalo or Marcus Loew taking, or a defendant distributor granting, licenses for the exhibition of the same or other pictures in any other theatre or theatres.

FIFTY-EIGHTH: In licensing its motion pictures for subsequent run exhibition in Buffalo in the Kensington-Bailey area, each of the defendant distributors acted independently, without consultation or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its

officers or representatives respecting the theatre or theatres from which it would derive the greatest amount of film license revenue from subsequent run exhibition of its pictures in Buffalo.

FIFTY-NINTH: The defendant distributors or any two or more of them did not at any time conspire or combine to harm, oppress or deprive the Bailey Theatre or the plaintiff of motion pictures or any particular run of motion pictures, nor did they monopolize or attempt to monopolize the subsequent run exhibition of motion pictures in the Kensington-Bailey area.

SIXTIETH: Prior to 1939, there were in Lackawanna, New York, a suburb of Buffalo, four theatre buildings, all of which were owned or leased by two individuals who had no connection with any of the defendants. Early in the summer of 1939, these individuals offered to lease the theatres to Buffalo, but Buffalo declined the proffered leases owing to the physical condition of the theatres and the high rental. Subsequently the four theatre buildings were leased to the plaintiff, and since September 1st, 1939, it has operated the Franklin Theatre and the Ridge Theatre as motion picture theatres in Lackawanna.

SIXTY-FIRST: Prior to the acquisition by the plaintiff of its theatre leases in Lackawanna, an individual, not connected with any of the defendants, had acquired property and prepared plans for the construction of a motion picture theatre in Lackawanna. Buffalo leased this theatre in February of 1940 and thereafter operated it as Shea's Lackawanna Theatre.

SIXTY-SECOND: From 1940 to the time of the commencement of this action, the plaintiff has operated in Lackawanna the Franklin and Ridge Theatres and has exhibited in these theatres on a first run in Lackawanna all of the motion pictures distributed by Fox, RKO, Columbia and United Artists and half of the motion pictures produced by Warner.

SIXTY-SECOND (A): During the season 1939-1940 Universal attempted to license its pictures to the plaintiff for exhibition on first run in Lackawanna, but the plaintiff refused to license said pictures. Thereafter, Universal licensed its pictures to Buffalo for exhibition in the Lackawanna Theatre on first run in Lackawanna.

SIXTY-SECOND (B): During the period in controversy, Fox licensed its pictures for exhibition to the plaintiff exclusively for first run in the City of Lackawanna. At plaintiff's request, Fox also licensed its pictures to the plaintiff exclusively for second run in the City of Lackawanna and Fox did not license its pictures to Buffalo or anyone else in said City of Lackawanna.

SIXTY-THIRD: Beginning 1940 and continuing to the time of the commencement of this action, Buffalo has exhibited in Shea's Lackawanna Theatre on a first run in Lackawanna the motion pictures distributed by Paramount, Loew's, Universal, and half of the motion pictures distributed by Warner.

SIXTY-FOURTH: Since its acquisition of the Lackawanna leases, the plaintiff has at all times had available to it motion pictures adequate in quantity and quality for the profitable operation of the Franklin and Ridge Theatres in Lackawanna. No claim is made by the plaintiff of any damage to its first run theatre in Lackawanna, the Franklin Theatre.

SIXTY-FIFTH: The acquisition of the lease of the Lackawanna Theatre by Buffalo was not occasioned by any attempt upon the part of the defendant, Buffalo, to harm, oppress or deprive the plaintiff of motion pictures or any particular run of motion pictures in Lackawanna and was not a part of any combination or conspiracy to monopolize or to attempt to monopolize the exhibition of motion pictures in Lackawanna. In acquiring the lease of the Lackawanna Theatre, the defendant, Buffalo, acted in accordance with its judgment that the

operation of a new motion picture theatre would prove to be a profitable undertaking and there was no purpose or intent upon the part of Buffalo or any of its officers or stockholders to injure or destroy the business of the plaintiff in Lackawanna.

SIXTY-SIXTH: Buffalo and Marcus Loew conducted separate negotiations with various of the defendant distributors for licenses for the exhibition of motion pictures at the Lackawanna, and these licenses were not conditioned upon Buffalo or Marcus Loew taking, or the defendant distributors granting, licenses for the exhibition of the same or other pictures in any other theatre or theatres.

SIXTY-SEVENTH: In licensing its motion pictures for first run exhibition in Lackawanna, each of the defendant distributors acted independently, without consulting or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its officers or representatives respecting the theatre or theatres from which it would derive the greatest amount of film license revenue from the first run exhibition of its pictures in Lackawanna.

SIXTY-EIGHTH: The defendant distributors or any two or more of them did not at any time conspire or combine to harm, oppress or deprive the plaintiff from first run motion pictures in Lackawanna, nor did they monopolize or attempt to monopolize the exhibition of first run pictures in Lackawanna.

SIXTY-NINTH: Both prior and subsequent to 1939 none of the distributor defendants, with the exception of Loew's and Paramount, had any interest either directly or indirectly in the ownership or operation of any motion picture theatre in the Cities of Buffalo, Lackawanna or North Tonawanda.

SEVENTIETH: Both prior and subsequent to 1939 all of the distributor defendants operated under a sales policy through

which each independently selected its own customers in the City of Buffalo and its immediate suburbs.

SEVENTY-FIRST: Both prior and subsequent to 1939 United Artists were engaged solely in the business of distributing motion pictures produced by independent producers. Each picture distributed by United Artists was licensed separately to each individual theatre and was subject to the acceptance or rejection of the representative of the independent producer. There were as many as twenty-one producer representatives and they frequently disapproved the license agreements negotiated by United Artists.

SEVENTY-SECOND: Both prior and subsequent to 1939 United Artists has not distributed a consistent number of motion pictures in any one year and its releases have varied from as few as five or six motion pictures to as many as twenty-one or twenty-two.

SEVENTY-THIRD: Subsequent to 1939 United Artists did not license its pictures for first run exhibition in the City of Buffalo to any one exhibitor and its pictures were exhibited on first run during this period in the following manner:

Name of Theatre	*Number of Pictures Played 1939-1946*
Buffalo	32
Erlanger	1
Great Lakes	47
Hippodrome	48
Lafayette	12
Mercury	1
Teck	5
Century	14

SEVENTY-FOURTH: Subsequent to 1939, Columbia did not regularly license its pictures for exhibition on subsequent run

in any of the theatres operated by Buffalo. Its pictures were regularly exhibited by the plaintiff at the Bailey Theatre on a first run in the Bailey-Kensington area and at the Franklin and Ridge Theatres on a first run in Lackawanna.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action.

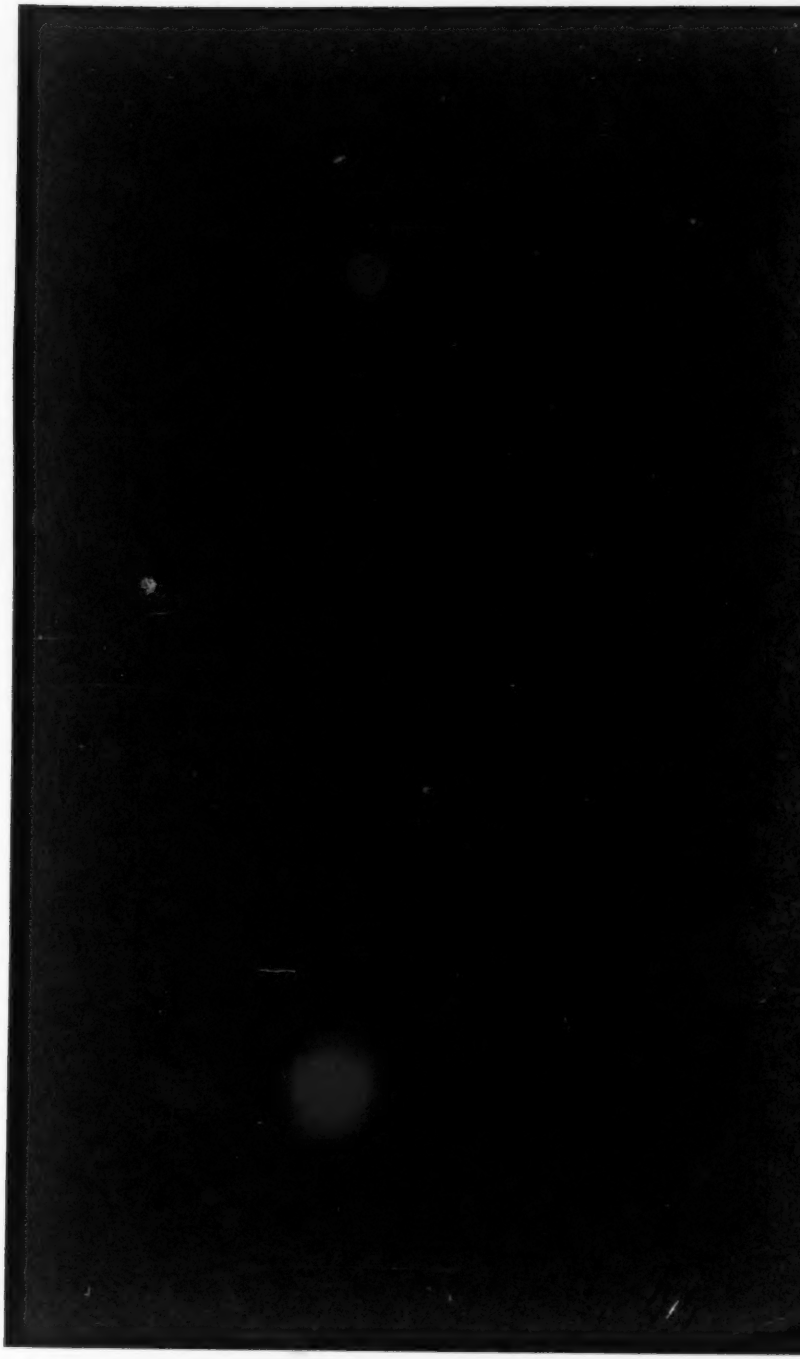
2. Plaintiff has failed to establish any violation by the defendants of the Sherman or Clayton Acts as alleged in the amended complaint.

3. The plaintiff has not been damaged in its business or property by any act or conduct of the defendants.

4. The first, second and third causes of action of the amended complaint must be and are dismissed as to all the defendants and the defendants should have judgment against the plaintiff dismissing said amended complaint together with their costs and disbursements.

Aug. 1, 1950

/s/ JOHN KNIGHT
United States District Judge



In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 392

DIPSON THEATRES, INC., PETITIONER

v.

BUFFALO THEATRES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Government is submitting this memorandum in support of the application for certiorari because it believes that the decision below has seriously misapplied the decision of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, and that correction of this misapplication is in the public interest.

On the original trial in the *Paramount* case, the the district court did not find illegal monopolization

or attempted monopolization, but it held that the defendants had engaged in numerous practices which were in illegal restraint of trade. One of the practices found to be illegal was pooling[1] or joint ownership of theatres by defendants who were both distributors and exhibitors of films. *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 350-352 (S.D. N.Y.). The court ruled that such pooling eliminated competition *pro tanto* both in the exhibition and in the distribution of films, "which would flow almost automatically to the theatres in the earnings of which they have a joint interest", and the court held that pooling, in the circumstances existing in the motion picture industry, constituted a restraint of trade prohibited by the Sherman Act (*id.*, p. 351). Joint ownership of theatres by the exhibitor defendants was held to produce the same results as pooling and to be equally banned by the Act (*ibid.*). The district court therefore entered a judgment which prohibited not only all existing pooling and joint ownerships by exhibitor defendants, irrespective of their particular circumstances, purposes or effects, but also all future pooling and joint ownerships by these defendants. *United States* v. *Paramount Pictures, Inc.*, 70 F. Supp. 53, 75 (S.D. N.Y.).

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[1] Pooling consists of operating as a unit theatres of two or more owners which normally are in competition with each other, and of dividing the profits of the pooled theatres among their owners on some agreed basis.

On appeal, this Court affirmed these judgment provisions. The Court held that the pooling practices "strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 149. The Court also held that prohibition of joint ownership as between exhibitor-distributor defendants was "plainly warranted" (*id.*, p. 151).[2] The Court said that when such defendants have joint interests in the outlets for their films "each in practical effect grants the other a priority for the exhibition of its films", for "the natural gravitation of films is to the theatres in whose earnings the distributors have an interest" (*ibid.*). The Court further stated (*ibid.*):

> Joint ownership between exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act.

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[2] Joint ownership as between a defendant exhibitor and a non-defendant was held to be illegal except in instances where the non-defendant's theatre interests "involve no more than innocent investments by those who are not actual or potential [theatre] operators" (*id.*, p. 153).

In the present case petitioner's claim for damages caused by respondents' violation of the Sherman Act covers the period from 1939, when petitioner acquired certain motion picture theatres in Buffalo, New York, to September 1946, when the complaint was filed. During this period respondent Loew's and respondent Paramount each owned one-third or more of the stock of respondent Buffalo Theatres, Inc. (referred to herein as Shea), which was the leading motion picture exhibitor in Buffalo (Fdgs. 14-16; R. 45-46).[3] Shea operated the Bailey and the Kensington until petitioner purchased the former theatre in 1939 (Fdgs. 15-16, 46; R. 45-46, 55-56). They were neighborhood theatres, and "so similar in quality and location that they could not economically play 'day and date', *i.e.*, each show the same feature on the same day" and "one had to be preferred over the other" (R. 2086).

Petitioner claims that prior to its purchase of the Bailey this theatre had almost always been second run and the Kensington third run as to the better pictures shown in both theatres, but that

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[3] Loew's and Paramount each acquired one-third of Shea's stock on its organization in 1934, and in 1944 each increased its interest in Shea to 43⅓%. During the period 1939-1946, respondent Vincent R. McFaul was president of Shea and had a 13⅓% interest in its stock. (Fdgs. 11, 14; R. 44-45.)

There are five first-run theatres in Buffalo. Until 1939, Shea operated four of them and since then it has operated three of them. Shea also operated, both before and after 1939, some eight subsequent-run theatres. (Fdgs. 15-17; R. 45-46.)

immediately upon petitioner's purchase of the Bailey the playing positions of the two theatres were reversed, with the Bailey demoted to third run and the Kensington promoted to second run. As we point out later (*infra,* pp. 6-7), this claim seems to be conclusively established by documentary evidence.

In the *Paramount* case there was, as previously stated, a blanket condemnation of joint theatre ownership as between exhibitor defendants (two of which were Loew's and Paramount). The Court in effect held that illegality was not dependent upon evidence showing, in particular instances, defendants' motives in entering upon joint ownership, the manner in which they had operated their jointly owned outlets, or the effect of joint ownership in bringing about discrimination by the defendants in the distribution end of their business. The fact that joint ownership gave the defendants a powerful incentive mutually to prefer, in the distribution of their films, the theatres in which they had mutual financial interest, was deemed sufficient to make the restraint a *per se* violation of the Sherman Act.

In direct conflict with this decision, the court below, in the present triple damage action, held that maintenance of a joint theatre venture was legal in the absence of a showing that the joint owners had "conspired to do * * * jointly" precisely what joint ownership impelled them to do—each give

preference in the distribution of its films to the jointly owned theatres (R. 2096). Thus the very aspect of joint ownership which, in the *Paramount* case, led to its condemnation, was viewed, in the present case, as indicative of innocence. The parallel action taken by Loew's and Paramount was regarded by the court below as not evidence of joint action because, as the court said, it "was to be expected" that each would pursue the policy of favoring the "theatres in which they had an interest" (*ibid.*). The court said (*ibid.*):

> Officers of both Loew and Paramount testified that it was the policy of each to favor theatres in which they had an interest, all other things being equal. This was to be expected, and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually. As we have already indicated, joint ownership of theatres by distributors is not illegal *per se* though the practice had given rise to sufficient abuse so that it was condemned in the *Paramount* case and both Paramount and Loew have since consented to surrender their interest in Shea.

The switch in the playing positions of the Bailey and Kensington, coinciding with the change in the ownership of the Bailey, appears to be incontrovertibly established. Schedule XI of Ex. P-136, reproduced in the Appendix to the petition for certiorari, sets forth all pictures shown at both

the Bailey and the Kensington for the years 1936-1941, inclusive (including only the "Top", "First Feature" or "A" pictures of double bills). This schedule shows that, of the picture with greatest drawing power (*i.e.*, those in which the receipts of either theatre were $1,000 or more), approximately 89% were shown first at the *Bailey* in the period prior to petitioner's purchase of the Bailey. Our compilation of such pictures shows the following:

Year	*Number Played First at Bailey*	*Number Played First at Kensington*
1936	42	4
1937	49	6
1938	50	8
1939 (Jan.-April)[4]	18	2
Totals	159	20

After the change in ownership, *all* such pictures were played first at the *Kensington*, both during the balance of the year 1939 and in each of the years 1940 and 1941.

When a "final judgment" of violation of the antitrust laws has been rendered against a defendant in a proceeding brought by the United States under these laws, the judgment is, within certain limitations, *prima facie* evidence in an antitrust

[4] Shea's lease on the Bailey expired at the end of July 1939 (R. 753), but the shift in playing position was made when Shea's president, respondent McFaul, learned of petitioner's purchase of the Bailey at the end of April 1939 (R. 609-10). Since the receipts from both the Bailey and the Kensington went to Shea until the expiration of Shea's lease on the Bailey the immediate shift in playing position would not adversely affect Shea to a material extent.

suit brought against the defendant by any other person. "Congressional reports and debates on the proposal which ultimately became § 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions." *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568. We submit that, in view of the policy of Congress given expression in Section 5, it is in the public interest that this Court grant review where, as here, a decision in private antitrust litigation appears to be in conflict with a decision regarding the same subject matter rendered by this Court in a Government suit under the antitrust laws. In addition, a decision which applies or appears to apply in a triple damage antitrust action a different test of legality than that which this Court applied in a Government antitrust action merits review and determination by this Court.

The significance of the decision below is not limited to the circuit in which it was rendered. There are many pending antitrust actions brought by private claimants against some or all of the *Paramount* case defendants, and a number of these cases involve claims for damages alleged to have resulted from discrimination by the exhibitor-distributor defendants in favor of jointly owned theatres, some of which were also operated under

pooling agreements.[5] A ruling by this Court on the issue presented here as to the meaning and effect of the *Paramount* decision would provide authoritative guidance to the lower federal courts in determining an important issue in these and other like cases, and would serve to promote correct and prompt final disposition of such litigation.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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[5] Among such cases are *Cinema Amusements* v. *Loew's Inc.*, No. 2800, D. Colo.; *Adelman* v. *Paramount Pictures, Inc.*, No. 1109, D. Del.; *Essaness Theatres Corp.* v. *Balaban & Katz Corp.*, No. 49 C 1315, N.D. Ill.; *Lea* v. *Columbia Pictures, Inc., et al.*, No. 3648-50, D. D.C.; *Meiselman* v. *Paramount Film Distributing Corp. et al.*, No. 669, W.D. N.C.; *Tivoli Realty Corp.* v. *Paramount Pictures, Inc.*, No. 1077, D. Del.; *Eagle Lion Classics, Inc.* v. *Loew's, Inc.*, No. 61-166, S.D. N.Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 392

DIPSON THEATRES, INC.,

Petitioner,

against

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. McFAUL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE AMICUS CURIAE MEMORANDUM OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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December 27, 1951.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 190 F. (2d) 951. The opinion of the District Court is reported in 86 F. Supp. 716.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

STATUTES INVOLVED

The statutes involved are the Act of July 2, 1890, 26 Stat. 209, and the Act of October 15, 1914, 38 Stat. 730, commonly referred to as the Sherman and Clayton Acts.

STATEMENT

The facts are stated in the respondents' brief in opposition to the petition heretofore filed. A more complete statement is found in the opinion of the Court of Appeals. 190 F. (2d) 951.

ARGUMENT

The amicus curiae memorandum by the United States seeks to retry the facts of this case in this Court. The merits of this private litigation have been resolved against the plaintiff-petitioner by the District Court and the Court of Appeals. The Court of Appeals did not content itself with the mere affirmance of the finding of no conspiracy as it might have done under Rule 52. It went further and demonstrated that the evidence clearly established that no conspiracy existed in Buffalo or Lackawanna, as alleged by plaintiff in its complaint.

Petitioner alleged a general over-all conspiracy, in which eleven defendants participated to monopolize first and second run exhibition in Buffalo and Lackawanna, and alleged that as

a result of that conspiracy petitioner suffered damage and injury to its theatres. Petitioner subsequently abandoned its claims as to all but the Bailey theatre (a second run neighborhood theatre) and the Government makes no issue as to the alleged operation of the conspiracy with respect to the other theatres of which petitioner originally complained. It is significant that neither petitioner nor the Government contends that as a matter of law the findings with respect to petitioner's other theatres, the Century or Lackawanna, constitute error although the same joint ownership* existed in those situations.

The Court of Appeals recognized the implausibility of petitioner's allegation as to the over-all conspiracy and said (190 F. (2d) 951, 960):

---

*The "joint ownership" or "joint interest" of certain theatres in Buffalo simply means this—that the Shea interests, Paramount and Loew each owned stock in a corporation called Buffalo Theatres, Inc., which was the lessee and operator of the Kensington theatre in competition against petitioner's Bailey theatre. The only evidence as to the origin of this joint interest is found in the record in the *Paramount* case and is as follows (R. 1934):

> "Q. Have Paramount and Loew's stock interests in Buffalo Theatres, Inc., which operates certain theatres in the Buffalo area? A. Yes.
>
> Q. How were those interests acquired? A. Prior to 1934 Paramount and Mike Shea were the only stockholders in certain corporations which leased and operated certain theatres in Buffalo. Loew's was the landlord of one of those theatres—the Great Lakes. Those corporations were in default in rent when Paramount-Publix went into receivership. Paramount-Publix had guaranteed the rent of the Great Lakes, and as a consequence, Loew's had a substantial claim against Paramount. There being no money available to satisfy this claim and the claims of the other landlords for rent, Buffalo Theatres Inc. was formed to take over the operation of the theatres and the landlords, creditors and former stockholders of the Lessee companies received stock in the new company.
>
> Q. Does Paramount operate these theatres? A. To the best of my knowledge Paramount has had nothing to do with the operation of the theatres since 1934."

> "There is also an inherent lack of plausibility in the complaint as a whole. If the defendants were engaged in a conspiracy to monopolize first and second run exhibitions in Buffalo, why would Shea fail to retain control of the Bailey and the Century in 1939, when it appears that it was offered a chance to buy the Bailey and renew the lease on the Century? If the theatres were as profitable as Dipson would have us believe, Shea would naturally have kept them. Furthermore, the complaint was dismissed as to the defendants Universal and Columbia and in so far as it applied to the Ridge Theatre, and no appeal has been taken from the dismissal. A conspiracy among the six remaining distributor defendants aimed at only two of the plaintiff's many theatres while all but Paramount and Loew favored the plaintiff elsewhere (and even they licensed it in Tonawanda) would seem to have been futile. Such a conspiracy would be entirely different from that shown in the *Paramount* case which apparently favored large combines such as Dipson. Also RKO, United and Warner did not regularly favor Shea even in the two theatres remaining at issue."

The injury allegedly suffered by the plaintiff-petitioner was laid by it to a conspiracy to which the parties were not only the two distributor defendants jointly interested with the exhibitor defendant but also six other distributing company defendants who concededly held no proprietary interest in any theatres in Buffalo. The finding below that the defendant exhibitors had achieved no local monopoly is not sought to be overturned. There is also acquiescence in the finding that the defendant exhibitors have not conspired to monopolize local exhibition in Buffalo to the exclusion of the plaintiff, and acquiescence in the finding that the conduct of the other distributor defendants demonstrated conclusively that they had

not confederated with the local exhibitors to foster and perpetuate any local exhibition monopoly in Buffalo.

In the trial below on the merits, plaintiff had the full benefit of the principles of law established in the decisions of this Court and of the District Court in the *Paramount* case. Complete and detailed findings of fact and conclusions of law were entered to the effect that there was no conspiracy and that the defendants' activities did not damage plaintiff in its property or business. There is no principle of law established in the *Paramount* case which requires a result different from that reached by the District Court and affirmed by the Court of Appeals.

The complaint did not allege any damaging impact on the plaintiff's business or property as a result of any stock interest of Paramount and Loew's in Buffalo Theatres and did not claim any damages on account of the existence of any such stock interest. The case was instituted, tried and determined solely as a general conspiracy case, that is, as a case of a conspiracy among all the defendants to deprive the plaintiff of the run of pictures which it wanted in three of its theatres. The plaintiff failed to prove any such conspiracy.

The petitioner made no attempt whatsoever before the Court of Appeals to demonstrate that any one of the essential findings of fact on the conspiracy issue was clearly erroneous. The court below, therefore, properly and necessarily affirmed the judgment of the District Court (*United States* v. *Yellow Cab Co.*, 338 U. S. 338).

Petitioner and the Government now attempt to argue that because Loew's, Paramount and McFaul (Shea) each owned stock in Buffalo Theatres, Inc., operator of theatres in Buffalo, this Court, as a matter of law, must reverse the trial court's findings of facts, affirmed on appeal, with respect to the Bailey

theatre. It is their contention that, regardless of the specific findings by the trial court that each distributor acted independently, the joint ownership, alone, is sufficient to constitute conclusive evidence of an over-all conspiracy among all eleven defendants which, contrary to the findings below, injured the plaintiff in his business or property.

No principle of law established by this Court in the *Paramount* case obviated the necessity of petitioner's showing the existence of the alleged conspiracy and that such conspiracy damaged it in its business or property. The mere existence of the joint ownership of theatres could not require entry of judgment in petitioner's favor unless it was alleged and proved to be part of the alleged over-all conspiracy in Buffalo and shown by the evidence to have been the direct cause of injury to the plaintiff. There was no such conspiracy and no proof of such injury. This issue was previously decided in *Fifth and Walnut* v. *Loew's, Incorporated*, 176 F. (2d) 587 (C.A. 2nd, 1949). This Court denied certiorari, 338 U.S. 894 (1950), and rehearing was denied 338 U. S. 940.

The trial court below clearly found that although a joint ownership of theatres existed in Buffalo, it had no impact on petitioner's theatres. The Court of Appeals reviewed all the findings in considering the effects of the joint operation on petitioners and said (190 F. (2d) 951, 960):

> "Had a monopoly been obtained by Shea we might have viewed the question differently but Shea did not have a monopoly of first and second run theatres in Buffalo and Loew and Paramount did not have a monopoly of available films. Shea did not use first run buying power to get second run preference, or vice versa, nor indeed has any such abuse been claimed. Nor did it attempt to exclude Dipson by contracting for more films than it could use. Dipson could and did obtain suffi-

> cient films to exhibit at the Century and Bailey (al though it did not obtain all it desired). Had a monop oly been the aim of Loew and Paramount, they would have caused Shea to retain control of the Century and Bailey. We hold that their activities did not show a joint action that should upset the finding that no con spiracy existed between them."

Neither court below found any violation of the Sherman Act in Buffalo, North Tonawanda or Lackawanna by the defendants or any attempt to monopolize on the part of Loew's and Paramount through their joint interest with McFaul in Shea. The only monopoly attempted in Buffalo was by the petitioner itself. Concerning Dipson's attempts to monopolize, the Court of Appeals said [190 F. (2d) 951, 960]:

> "As we have said, had Dipson's demands been acceded to by the distributors it would have secured a monopoly with far less reason to support it than Shea has ever had. There is evidence that Dipson wanted all or nothing from each distributor and testimony from its own witness that its aim was a monopoly."

In the face of specific findings of fact by the District Court, fully supported by the evidence, that plaintiff-petitioner had not been injured by any action of the defendants, the amicus curiae memorandum attempts to show injury to plantiff by means of its own interpretation of one exhibit (Pl. Ex. 136). In view of the attempt of the United States as amicus curiae to bolster the petitioner's case on the merits by arguing that because of the change in ownership the Bailey was "demoted" to third run and the Kensington "promoted" to second run, we also call attention to the forty-fifth and part of the forty-seventh findings of fact of the District Court as follows:

> "By 1936, Buffalo was showing half of the better pictures at the Kensington ahead of the Bailey and half at the Bailey ahead of the Kensington. Thereafter, and in the 1937-1938 season, the management began to show more of the better pictures at the Kensington ahead of the Bailey" (R. 55).
>
> (A): "Prior to plaintiff's acquisition of the Bailey in 1939, RKO exhibited its better pictures and a majority of its pictures at the Kensington ahead of the Bailey and in the 1937-38 and 1938-39 seasons RKO received more money in license fees from the exhibition of its pictures at the Kensington than at the Bailey" (R. 57).

The amicus memorandum would have an inference of fact drawn by this Court in flat contradiction to the findings of the District Court concurred in by the Court of Appeals. But such findings are final unless there is an exceptionally strong showing of error. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949), *cf. Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3 (1936); and *Comstock* v. *Group of Investors*, 335 U. S. 211, 214 (1948). We respectfully submit that the above stated difference of opinion between the amicus curiae and the District Court is not proper support for a petition for certiorari.

In addition, we call attention to Judge Hand's opinion which clearly shows that there was more than ample evidence supporting the findings of fact made by the District Court as to lack of injury to plaintiff resulting from any acts of the defendants. Judge Hand said:

> "In view of the foregoing we find that Judge Knight's conclusion as to the lack of any conspiracy affecting the Bailey and Century was supported by the evidence and must be sustained. As we affirm the de-

> cision below on the ground that no illegal conspiracy is shown, it is unnecessary to discuss so much of that opinion as held that conspiracy or not, plaintiff had suffered no damages. Suffice it to say that it appears from the record that there were many reasons given by the appellees which would explain Dipson's lack of financial success even in the absence of conspiracy and would negative any inference of conspiracy that might arise from the existence of unexplained damages or losses. The losses at the Century seem to have been the result of bad management, and at the Bailey seem in large part due to bad management, unfair competition by the Genesee and a general decline in the neighborhood."

The amicus memorandum urges that the supervisory power of this Court should be exercised because the Court of Appeals said that the joint ownership of theatres by Paramount, Loew's and Shea in Buffalo was not illegal as such. As previously shown, that statement was not determinative of the case at bar. The findings in this case which are not sought to be disturbed establish that no injury to plaintiff resulted from this joint ownership. Even if the joint ownership here involved were held to be illegal *per se*, the question presented by the amicus memorandum is academic. Furthermore, nothing decided in *United States* v. *Paramount* is in conflict with this statement. It is clear that this joint ownership was not conceived for the purpose of monopoly (see footnote, p. 3, *supra*).

The amicus curiae memorandum in claiming that Judge Hand misinterpreted the *Paramount* case in his decision in this case completely overlooks the fact that Augustus N. Hand, Circuit Judge, presided over the Expediting Courts which tried the *Paramount* case, both before and after remand, and that both

of the opinions of the Expediting Courts were written by Judge Hand. Such claim also overlooks the fact that in deciding the instant case Judge Hand specifically stated that he was fully aware of the principles decided in the *Paramount* case, for he said (p. 958):

> "Of course, the activities revealed in the *Paramount* case lead us to scrutinize with great care the activities of the same defendants here for where one has violated the Sherman Act in one situation, it might be expected that the same parties would be willing and able to do so elsewhere."

The memorandum by the Government has advanced no argument which demonstrates that Judge Hand misconceived the holdings of this Court in the *Paramount* case concerning joint interests. In fact, the question of the scope of this Court's decision in connection with joint interests was previously decided in *Fifth and Walnut* v. *Loew's Incorporated,* 176 F. (2d) 587 (C. A. 2nd, 1949). This Court denied certiorari, 338 U. S. 894 (1949), and rehearing was denied, 338 U. S. 940 [See pages 10-12 of Respondents' Brief In Opposition To The Petition]. In that case the Court of Appeals for the Second Circuit said (p. 590):

> "The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of *course, no one could reasonably contend that every joint ownership of a*

> *theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made.*" (Italics supplied.)

The discretionary exercise of this Court's supervisory power is sought to be invoked on the suggestion that other private litigation pending in several District Courts of the United States contain issues of injury suffered by illegal discrimination in favor of jointly owned theatres. But there was no amicus curiae memorandum filed by the Government when a similar question was presented in *Fifth and Walnut* v. *Loew's Incorporated*, 176 F. (2d) 587 (C. A. 2nd, 1949), cert. den. 338 U. S. 894, rehearing den. 338 U. S. 940. Seven private cases are referred to by the amicus memorandum in its footnote 5. In six of those cases the appearances for the respective plaintiffs are by former members of the Antitrust Division of the Department of Justice who, at one time or another, appeared as attorneys for the Government in the *Paramount* case. It is far fetched for the amicus memorandum to suggest that the disposition of this case on the facts advertently found in the two courts below would inevitably bring about a perversion of the application of *United States* v. *Paramount* in other private litigation.

Neither petitioner nor the Government gains any support for its position from this Court's decision in *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951). The amicus memorandum suggests that the purpose of Section 5 of the Clayton Act as applied in the *Emich* case is in some way violated by the decision below. But it is obvious that the application of Section 5 was not before the trial court or the Court of Appeals. The decree in the *Paramount* case was not and could not have been offered in evidence. Petitioner concedes this. Moreover, even if petitioner had had the benefit of the decree, such decree would have been only *prima facie* evidence and could not have required the trial court to enter judgment for petitioners.